

*United States Court of Appeals
for the Second Circuit*



APPENDIX

ORIGINAL

74-2499

**United States Court of Appeals
For the Second Circuit**

WINSTON E. KOCK, JR.,
Plaintiff-Appellee,
against

THE BRUNSWICK CORPORATION,
Defendant-Appellant.

**Appeal from a Judgment of the United States District
Court for the Southern District of New York**

**JOINT APPENDIX
VOLUME II OF TWO VOLUMES
(Pages 231A to 471A)**

BLUMBERG, SINGER, ROSS,
GOTTESMAN & GORDON
Attorneys for Defendant-Appellant
245 Park Avenue
New York, New York 10017
(212) 682-7700

BRASHICH & FINLEY
Attorneys for Plaintiff-Appellee
20 East 46th Street
New York, New York 10017
(212) 684-1730

BURKE & BURKE
Attorneys for Plaintiff-Appellee
1 Wall Street
New York, New York 10005
(212) 344-5100



5

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	PAGE
List of Relevant Docket Entries	1A
Complaint	2A
Supplemental Answer of Defendant, Brunswick Corporation	10A
Plaintiff's Reply to Counterclaim	20A
Plaintiff's Amended Requests to Charge	22A
Defendant's Requests to Charge	29A
Judgment	32A

TESTIMONY

Winston E. Kock, Jr.:	
Direct	35A, 155A, 375A
Cross	226A
Redirect	311A
Richard L. Bersch:	
Direct	127A
Cross	142A
Redirect	154A
Deposition of Gerald Oles	326A
William Martin Kratzenberg (as a witness on behalf of plaintiff):	
Direct	367A
Cross	371A
Redirect	371A
Recross	372A

PAGE

PLAINTIFF'S EXHIBITS

14—Contract Dated November 17, 1972 Between Kock and N.W. Ayer, Inc.	454A
15—Proposed Contract Prepared by Kock Dated Oc- tober 12, 1972 and Letter Dated November 27, 1972 from Brunswick to Kock	457A
78—Letter Dated December 1, 1972 from Rumrill Hoyt, Inc. to Kock	462A
80—Letter Dated January 4, 1973 from Baskin- Robbins to Kock	464A
81—Letter Dated January 9, 1973 from Chelsea Mill- ing Co. to Kock	466A
84—Letter Dated February 7, 1973 from Carter Wal- lace to Kock	468A
93—Letter Dated May 16, 1973 from Baskin-Robbins to Kock	470A

1 rdh46

231 A
Kock-cross

198

2 Q So as you understood the '73 season and the '74
3 season were two separate seasons that overlapped each other;
4 is that correct?

5 A I didn't say that.

6 Q I think you told us the '73 season was the entire
7 calendar year.

8 A I said it could be parts of the entire calendar
9 year. If it were '73-'74 it would carry into '74.

10 Q And if it was simply '73?

11 A Then it would probably be 1973.

12 Q No, your presentation I think you talked about.
13 Your attractive bowling shoes.

14 MR. BRASHICH: Object.

15 MR. NEWMAN: If it is objectionable I will
16 rephrase it.

17 THE COURT: All right, go ahead.

18 Q Who would use the paper sheet, what kind of bowler
19 would use the paper sheet?

20 A All bowlers might use the paper sheet, league
21 and open.

22 Q League and open?

23 A Yes.

24 Q Where did you get that information?

25 A Well, can I give you specifics?

2 Q Certainly, please.

3 A In your own bowling center in Brooklyn where
4 you have both telescores and open play sheets, some of the
5 leagues prefer to use the paper sheets even though they are
6 open play sheets and not designated or set up to be league
7 sheets because they do not like the overhead projectors.
8 So that in that situation open and league bowlers might
9 use it. The telescore projector is primarily for league
10 bowlers.

11 Q But primarily the league bowler is going to
12 use the plastic; is that correct?

13 A If there is a telescore in the bowling center,
14 yes. Otherwise he might use a piece of paper.

15 Q If there is not a telescore would there be
16 something like an automatic score as well, were you familiar
17 with that?

18 A There could be an automatic score.

19 Q And Brunswick Bowling Centers had automatic scores?

20 A Yes.

21 Q None of your sheets would apply to the automatic
22 scorers, would it?

23 A Are you admitting that to me?

24 Q I am asking.

25 A That's what I was told, they would not be used

1 || rdh48

Kock-cross

2 in automatic bowling centers.

3 Q As compared to leagues and open bowlers did
4 you know what percentage of the bowling was done by
5 leagues and what percentage was done by open bowlers in the
6 Brunswick Centers?

7 MR. BRASHICH: I am going to object. I don't see
8 the materiality of how many bowlers bowl on plastic or paper
9 in this particular case.

10 MR. NEWMAN: Your Honor, there has been testimony
11 with respect to the difficulties with the plastics. I would
12 like to establish from Mr. Kock, if I can, if he knows,
13 just what the seriousness of the failure of the plastic was,
14 if he knows.

15 THE COURT: No. Objection sustained. If it is
16 part of your counterclaim you may call him in your own case.

17 MR. NEWMAN: I would also like to know his
18 knowledge of the bowling business.

19 THE COURT: I gathered that but that particular
20 objection in light of your explanation is sustained.

21 MR. NEWMAN: I would like to add this on the
22 purpose. I would like to know his knowledge of the bowling
23 business.

24 THE COURT: As to general knowledge I don't think
25 it is necessary.

1 rdh49

Kock-cross

2 Q Now, when you started out in this venture
3 you started out with Mr. Al Tiede, didn't you?

4 A Yes, I did.

5 Q And did Mr. Tiede have any experience in the
6 bowling business?

7 A He was a bowler.

8 Q Other than that did he have any experience?

9 A You mean did he manage a bowling center? I don't
10 believe he did.

11 Q Had he rendered advertising services to a
12 bowling center?

13 A Had he rendered advertising services? Mr. Tiede
14 was a design expert. I do not know if he rendered ad-
15 vertising services to a bowling center, no.

16 Q Whose idea was it as between you that there
17 be a national advertising on bowling score sheets?

18 A Before Al Tiede or with Al Tiede?

19 Q Was it your idea, was it Tiede's idea or was it
20 something you both got together?

21 A We got together on that. Many people have ideas
22 of national advertising. Brunswick had them.

23 Q It was both you and Tiede got together and
24 discussed it; it wasn't that he gave you the idea or you gave
25 him the idea?

2 A I would say he gave me the idea.

3 Q As a matter of fact the business which you
4 started out with him was called Tiede Enterprises not
5 Kock Enterprises?

6 A That's right.

7 Q He was the predominant factor in the business,
8 was he not?

9 A No, he was not.

10 MR. BRASHICH: I will object to "predominant
11 factor."

12 THE COURT: He has answered no, in any event.

13 When counsel gets up Mr. Kock, wait a minute before
14 you answer so I can rule.

15 Okay.

16 Q There came a time when you parted this business
17 relationship with Mr. Tiede, didn't there?

18 A Yes, we separated.

19 Q When was that?

20 A June of 1972.

21 Q Was that before you saw Mr. Kratzenberg or after
22 you saw Mr. Kratzenberg?

23 A Before I saw Mr. Kratzenberg.

24 Q How long before?

25 A A week before.

2 Q Did you tell Mr. Tiede you were going to see
3 Mr. Kratzenberg?

4 A Yes, he knew.

5 Q And Mr. Tiede felt he didn't want to participate;
6 is that correct?

7 MR. BRASHICH: I will object to what Mr. Tiede
8 felt.

9 THE COURT: Sustained.

10 Q Did Mr. Tiede say he was not interested in
11 participating further?

12 A Yes, he did.

13 Q Now, let's come to the time that you saw Mr.
14 Kratzenberg in January of 1972?

15 A Yes.

16 Q Did Mr. Kratzenberg discuss with you the
17 situation that Brunswick was in with respect to its present
18 suppliers, its then supplier of score sheets?

19 A He discussed some phases of it, yes.

20 Q What did he tell you about the then supplier
21 of score sheets with respect to termination dates of the
22 advertising?

23 A I don't think he said very much about that.

24 Q Did he say anything about that?

25 A He said that he was happy to see national score

1 rdh52

~237A
Kock-cross

204

2 sheet advertising, that he, Brunswick, was trying to find
3 national score sheet advertising and that he was much
4 interested in our proposal with regard to it because it
5 was national advertising oriented.

6 Q Did he tell you there would be a problem with
7 respect to taking on a new score sheet supplier relating
8 to a phasing in or a phasing out of the Peabody score sheets
9 in different centers?

10 A I don't believe he really used phase-in-phase out.

11 Q Not those words, the concept. Did he tell you
12 there would be a problem involved?

13 A He said he had a supplier, Peabody, yes.

14 Q Did he tell you there would be a problem about
15 getting a new supplier having to do with termination dates
16 at different centers?

17 A No, he didn't say at different centers.

18 Q Did he talk about a problem in getting a new
19 supplier?

20 A I don't believe so.

21 Q Well, did he ever mention that concept to you
22 at any time during your discussions, even after January, 1972?

23 A Which concept? New supplier?

24 Q The concept that there would have to be a phase out
25 of the Peabody score sheets at different centers at different

2 times?

3 A Yes, he talked about that in June.

4 Q What did he say to you about that?

5 A That Peabody held a contract with Brunswick
6 or an agreement, or I think he said Peabody was the supplier,
7 in June; that he couldn't start me until March because
8 there were various end dates for Peabody and we discussed
9 and tried to figure out a way as to did Peabody have a
10 single start and end date so that Mr. Kratzenberg could
11 establish a single start and end date. Was there some
12 way, since there were extra score sheets in the Brunswick
13 Bowling Centers, that these extra score sheets could be
14 used to phase in as to a March start date which would have
15 been my date, and what Mr. Kratzenberg said he would look
16 into was how this could be arranged for a March start date.

17 Q Mr. Kratzenberg indicated to you that there
18 would have to be staggered terminations of the Peabody
19 score sheets at the different centers; is that not correct?
20 That they didn't all end on the same day; is that correct?

21 A He wasn't really sure of that. He said it could be

22 Q That they all ended on the same day?

23 A He knew Peabody started with Brunswick on one
24 particular day. He didn't know much more than that at that
25 time because I don't know if he checked it at that time.

2 Q Didn't he tell you that Brunswick got into the
3 business of different centers at different times beginning
4 in 1964?

5 A That's possible, yes. Brunswick built bowling
6 centers through 1964, '65, '66, of course.

7 Q These were open on a different date, weren't they?

8 A They might.

9 Q Or do you think they all opened for business on
10 a given date, the same day every year, is that your concept?

11 A It is not.

12 Q You knew they all began business on different
13 days throughout the year?

14 A Yes.

15 Q And we are talking about 180 bowling centers,
16 aren't we?

17 A Approximately 200.

18 Q And didn't you then have the understanding that
19 there would be completely different termination dates
20 for the Peabody supplies at the approximately 200 different
21 bowling centers?

22 MR. BRASHICH: I will object to the understanding.
23 If he wants --

24 MR. NEWMAN: I would like to know what Mr. Kock
25 understood. I think it is a fair question.

2 THE COURT: Yes. I will overrule the objection.

3 MR. BRASHICH: Thank you, your Honor.

4 A You are asking me what I understood.

5 Q Did you have the understanding that there would
6 be different termination dates at the different centers,
7 the approximately 200 bowling centers relating to the
8 Peabody score sheets?

9 A I don't think I can answer that particular
10 question yes. I'd have to answer that one no. It is not
11 my understanding. Do you want what I understood?

12 Q Did you have the understanding that all of the
13 bowling centers terminated the obligation to Peabody on
14 the same date?

15 A I didn't have that understanding either.

16 Q Did you have the understanding that they terminated
17 their obligation to Peabody on different dates?

18 A I can't answer that question either. No, I
19 didn't have that understanding, that wording, that under-
20 standing.

21 Q Did Mr. Kratzenberg say to you that there were
22 different termination dates at the different centers?

23 A He said there may be different termination dates.
24 He would check.

25 Q He had to check and advise you; is that it?

1 rdh56

Kock-cross

2 A That's what he said. He had it figured out.

3 Q Did he undertake with you that he would begin
4 terminating the Peabody supplies at a certain time?

5 A I assume such, yes.

6 Q When did you assume he would begin terminating
7 them?

8 A I assume he was terminating them all along.

9 Q Beginning June?

10 A Whenever he wanted to begin to terminate them.

11 Q This is a June conversation we are talking about.

12 A This is a June conversation. That he wanted
13 me to continue in the business, to go forward for the March
14 start that we had agreed on; that he would take care of
15 anything on that side and I would push to get national
16 advertising on my side.17 Q Is it your testimony that Mr. Kratzenberg said
18 to you I will start terminating Peabody at different
19 centers beginning in June?

20 A He did not say that to me.

21 Q Or anything now?

22 A No, he never said that.

23 Q Or beginning a short time from your conversation?

24 A No.

25 Q Did you understand that that's what he was

1 rdh57

Kock-cross

209

2 setting about to do?

3 A That's what I thought he was setting about to do,
4 yes.5 MR. NEWMAN: May I have Plaintiff's Exhibit 6,
6 please?

7 MR. BRASHICH: Yes(handing).

8 Q Mr. Kock, I would like to show you, or I can
9 read it to you if counsel has no objection, from a letter
10 of Mr. Kratzenberg to you which has been marked Plaintiff's
11 Exhibit 6, dated July 20, 1972.12 I would like to read the letter in its entirety,
13 addressed to you.

14 "Dear Mr. Kock:

15 This is to acknowledge receipt from you of your
16 proposal dated June 8, 1972, to supply Brunswick with score
17 sheets for its exclusive use in the approximately 200 bowling
18 centers operated and managed by Brunswick in the United
19 States. We are very much interested in your proposal and
20 as soon as we can determine what our existing obligations
21 are we will be able to forecast a starting date for your
22 program. Assuming, of course, that the score sheets meet
23 with our approval. We appreciate the time you have spent
24 in trying to put this program together. Yours truly."

25 Now, after receiving Plaintiff's Exhibit 6 did you

1 || rdh58 Kock-cross

2 still understand that Mr. Kratzenberg was undertaking to
3 terminate Peabody at the different Brunswick centers?

4 A You are asking me a different question. He
5 was checking his obligations, you say.

6 Q. I think you told us --

7 A I understood him to be checking those obligations,
8 correct.

9 Q I think you told us you understood him to be
10 terminating centers beginning June.

11 A I didn't say that.

12 Q When did you think he was going to start terminating
13 centers using Peabody?

14 A I didn't know when he was going to start terminating
15 centers.

16 Q Did you think this would happen all at once
17 effective March 1st?

18 A Wait a minute. Would he terminate all effective
19 March 1st or would they all be terminated as of March 1st?
20 Two different questions.

Q Either way.

22 A I understood they were all to be terminated as
23 of March 1st, yes.

24 Q For them to be all terminated March 1st, didn't you
25 understand he had to be terminating them over a long period.

2 of time prior to March 1st?

3 A Again I didn't know what he was doing to terminate
4 them. That was not my part of the agreement. That was his
5 part. He is the one that had to terminate them.

6 Q But as of July 20th, when he refers to your
7 proposal and where he indicates that as soon as he can
8 determine existing obligations, that you then have the under-
9 standing that he was going to set about terminating Peabody
10 centers.

11 A I understood he was determining how to terminate,
12 yes.

13 Q But not that he had done so?

14 A I didn't know one way or another.

15 Q Or not that he was doing so?

16 A He may have been doing so. I didn't know. It doesn't
17 say that.

18 Q Incidentally, on Plaintiff's Exhibit 3, which is
19 the June 8th proposal, can you tell me who prepared that?

20 A I did myself.

21 Q Who typed it physically?

22 A It is possible I did it. I did my own typing.
23 I'm sure I did.

24 Q Did you do it in your own office?

25 A Let me see which typewriter that is.

2 I used the typewriter at Mr. Brashich's office
3 because it is a nice typewriter.

4 Q Were you talking to Mr. Brashich about the
5 proposal in June of 1972?

6 A Yes, I was.

7 Q Was he giving you advice about the proposal
8 in June of 1972?

9 MR. BRASHICH: I will object.

10 THE COURT: On what ground?

11 MR. BRASHICH: Relevance, your Honor.

12 THE COURT: Overruled.

13 A Could I have the question again?

14 (Question read.)

15 A Yes.

16 Q Did you show him the proposal, Plaintiff's
17 Exhibit 3, before you brought it out to Brunswick?

18 A I'm pretty sure I let him look at it, read it,
19 see if it was spelled correctly, grammar errors, was I making
20 up something that was good. Yes, I showed it to him.

21 Q Spelling, grammar and something good. Does the
22 something good have to do with legal advice?

23 A I don't think I really asked him if it was a legally
24 binding thing at that time, no.

25 Q Did you report to Mr. Brashich on your meeting with

2 Mr. Kratzenberg of June 8th?

3 A Yes, I did.

4 Q And did you show Mr. Brashich Plaintiff's
5 Exhibit 6, Mr. Kratzenberg's letter of July 20th?

6 A I don't think I did show him that letter, no.

7 Q Did you ask him whether or not you had an agreement
8 effective June 8th?

9 A I didn't believe I did, no.

10 Q Now, can you tell me when for the first time
11 you actually knew that there was a discontinuance of the
12 Peabody service at any center?

13 A I would have to say November 27th when Mr.
14 Kratzenberg showed me the letter where Peabody was cancelled.

15 Q And on November 27th you expected that by March
16 1st all of the 200 bowling centers would have phased out
17 their use of the Peabody sheets; is that correct?

18 A I didn't know about phase out. I knew that I was
19 there and that he was cancelled as of March 1st in all Bruns-
20 wick Bowling Centers. That's what Mr. Kratzenberg had said.

21 Q You thought this was going to take place in that
22 brief period of time; is that correct, between effectively
23 December and March?

24 A I didn't know when it was taking place. It could
25 have been taking place.

2 Q It is three months, isn't it?

3 A That is three months? That's one, two, three.

4 Q You thought they were all Peabody's in all
5 200 centers that had been servicing in staggered dates
6 throughout the year were going to be terminated through
7 that three-month period of time?

8 A I didn't think they were going to be terminated
9 in that three-month period of time. I thought they were
10 going to be terminated as of March.

11 Q Did you propose Brunswick break its agreement with
12 Peabody?

13 A I never proposed that, no.

14 Q As a matter of fact you didn't want Brunswick
15 to break its agreement with Peabody, did you?

16 A I didn't even know what Peabody's agreement was.

17 Q But you knew there was an agreement with Peabody?

18 A I knew that Mr. Kratzenberg was checking into
19 an agreement, yes.

20 Q And was it your intent to have Brunswick break
21 whatever agreement it had with Peabody in order to do
22 business with you?

23 A Quite obviously not.

24 Q As a matter of fact, it was your intent to have
25 Brunswick live up to its agreement with Peabody; is that correct?

2 A Not knowing what that agreement with Peabody was,
3 I don't know how to answer that question.

4 Q Well, did you have to know what the agreement
5 was before it could be your intent that Brunswick live up
6 to the agreement?

7 A Not really. Brunswick entered into an agreement
8 with me. That's the one I was concerned with, for March.

9 Q You weren't concerned with whether Brunswick
10 broke its agreement with Peabody; is that it?

11 A I didn't say that.

12 Q That's what I am trying to determine.

13 A Brunswick was taking care of its agreement
14 with Peabody. They were giving me an agreement for March.
15 How Brunswick was taking care of its agreement with Peabody
16 I cannot be held responsible for that.

17 Q Well, isn't it the fact that your agreement
18 as expressed in the letter of November 27th is expressly
19 subject to whatever Brunswick's obligations are to Peabody?

20 A Brunswick had no obligations to Peabody, they were
21 cancelling him by letter on November 27th, I was told, I was
22 shown.

23 Q November 27th, is that correct?

24 A November 27th.

25 MR. NEWMAN: May I have Plaintiff's Exhibit 16,

2 please?

3 MR. BRASHICH: Yes (handing).

4 MR. NEHMAM: And Plaintiff's 15.

5 MR. BRASHICH: Yes (handing).

6 Q Plaintiff's Exhibit 15 is the letter from
7 Brunswick signed by Mr. Kratzenberg to you dated November
8 27th.9 I would like to read to you from the second
10 paragraph where it states, "As we explained to you, Brunswick
11 may have certain commitments to Walt Peabody advertising
12 service. Brunswick intends to live up to any legally
13 binding obligations to Peabody but we will take every
14 legally permissible step to phase them out at the earliest
15 practicable time."16 That letter is the letter you are relying on as
17 your contract with Brunswick, isn't it?18 A And many conversations and letters in addition
19 to that, yes.20 Q Did you grant to Brunswick the right to live
21 up to its legally binding obligations with Peabody?22 A Brunswick told me they were living up to their
23 legally binding obligations, that they were cancelling
24 Peabody and they couldn't sign my contract until he received
25 his cancellation. At the time he received his cancellation,

1 rdh65

2 that was it.

3 Q Is it your testimony then that the language
4 in Plaintiff's Exhibit 15 is meaningless, where Brunswick
5 on the same day that it is sending the notice to Peabody is
6 telling you that it intends to live up to those obligations
7 that it may have obligations and that it will take every
8 legally permissible step to phase them out at the earliest
9 practicable time; is it your testimony then that they had
10 already phased them out?

11 A Mr. Kratzenberg was calling me that he had had
12 many numerous conversations, writings with Peabody.

13 Q Could you answer that question yes or no, please.
14 Is it your testimony that as of November 27th Brunswick
15 had already phased Peabody out?

16 A For March of 1973?

17 Q For March, they had already phased them out?

18 A All were already phased out or would be phased out
19 effective by or gone by March?

20 Q You understand that all were phased out on
21 November 27th, effective November 27th?

22 A No, I didn't understand all were phased out on
23 the 27th.

24 Q Is it your understanding that notice had been
25 given which would phase all the Peabody out by March 1st?

2 A The rest of them that had not been phased out, yes.

3 Q It doesn't say that in the November 27th letter.

4 A That's what he said to me.

5 Q When was the first time you had a contract
6 with Brunswick which committed it to you to buy score sheets?

7 A They are going to buy some score sheets from me?

8 Q To use score sheets. Thank you.

9 A When Bill called me and said commit yourself.
10 I have to have your committal so I can go ahead so you will
11 be ready for March.

12 Q It wasn't on November 27th, is that right?

13 A I committed myself.

14 Q When did you have Brunswick committed?

15 A Brunswick was committed I assumed as of November
16 27th.

17 Q Not before?

18 A Well, the agreement was there. You are confusing
19 me.

20 Q Was Brunswick committed, as you understood it,
21 to use score sheets furnished by you before November 27th?

22 A I don't know how to answer that. That could
23 be a legal interpretation that I don't know how to make.

24 I was committed in August; Brunswick said in November to me
25 that I have it for March. We are just finalizing it.

1 rdh67

252 A
Kock-cross

2 Q Did you have a firm commitment with Brunswick
3 prior to November 27, 1972?

4 A Did I feel I had a firm commitment? Yes, I feel
5 I had a firm commitment.

6 Q From Brunswick, not the other way. Did you feel
7 you had a firm commitment from Brunswick prior to November 27,
8 1972?

9 A Yes, I would say I felt that.

10 Q You understood that as a matter of law; is that
11 correct?

12 A I don't know about a matter of law.

13 Q You consulted with Mr. Brashich?

14 A I didn't consult Mr. Brashich on that matter.

15 Q Did you consult with Mr. Brashich subsequent
16 to the June 8th letter?

17 A After June 8th?

18 Q Yes.

19 A Yes.

20 Q On the subject matter of the agreement with Bruns-
21 wick.

22 A On the June 8th agreement or the October 12th?

23 Q The agreement for Brunswick to furnish score sheets,
24 did you consult with Mr. Brashich after June 8th?

25 A Yes.

2 Q Did you consult with him about the preparation
3 of the October 12th letter which is part of Plaintiff's
4 Exhibit 15?

5 A Yes, I did.

6 Q Isn't it a fact that Mr. Brashich drafted the
7 letter of October 12th?

8 A Yes, I would say that. I guess that's right.

9 Q Could you tell me whose initials appear at the end
10 of Exhibit 12 indicating that that person is the typist?

11 A I typed it myself.

12 Q The initials I will show you are WEK. DRB.

13 Who typed the letter?

14 A It is possible Deyan Ranko Brashich.

15 Q Was Mr. Deyan Ranko Brashich also the typist
16 of the letter?

17 A I may have retyped it. One of us typed it, sure.
18 It is the work product of both of us. I will give you
19 Dan typed it. I'll let him be the typist.

20 Q I don't want you to give me anything. Just tell
21 me what the facts are.

22 A I don't remember who typed it.

23 Q It is clear Mr. Brashich was actively involved
24 in the drafting of it?

25 A I already said yes, he was. You betcha.

Q I'd like to call to your attention certain language in Plaintiff's Exhibit 3, which is the June 8th letter, and this is the second paragraph which states, "I will supply you with 4.5 million bowling sheets and 30,000 acetate sheets for your use in bowling centers owned and operated by you for a period commencing March, 1973, and terminating March, 1974."

I have read that correctly, haven't I?

A Could you read some more later on?

Q I would like to read something in Plaintiff's Exhibit 15, which is the letter of October 12th: A parallel section, if I may, or Mr. Brashich states, "That this supply will be for a period commencing March, 1973, through March, 1974."

That's a change in language, isn't it?

A Am I allowed to read the following paragraphs out loud or just these two paragraphs?

Q I would like to direct your attention to these particular phrases.

A These and not the following?

Q Yes.

A There is a different word interposed, yes.

Q Whose responsibility was it to change the language, was it your idea or Mr. Brashich's idea?

1
2 A You are saying in words means a difference in
3 thought. I don't know. This one I typed rough myself and
4 this one Dan typed. It is a difference of a word.

5 Q By the time of the October 12th letter Mr. Kratzenber
6 had been telling you that there would have to be phasing in;
7 is that correct?

8 A No, it is not.

9 Q When you said then -- when you changed the language
10 to read "For a period commencing March, 1973, through
11 March, 1974," didn't you mean there would be different commence-
12 ment dates commencing March, 1973, through March, 1974?

13 A I think I meant exclusively which is what is said
14 later on.

15 Q It had nothing to do with your knowledge that there
16 would have to be staggered termination dates; is that correct?

17 A I didn't know that. No.

18 Q Did you ask Mr. Kratzenberg in November of 1972,
19 on November 27th whether he had already terminated any Peabody
20 centers?

21 A No, did not ask him if he had already terminated.

22 Q Wouldn't your understanding that the Plaintiff's
23 Exhibit 16, that is the letter addressed to Peabody, was the
24 first notice of termination given by Brunswick to Peabody?

25 A I understood it to be termination for all Peabody

1 rdh71

256A
Kock-cross

2 score sheets in all bowling centers, as it said.

3 Q That's the letter that's dated simultaneously
4 with the November 27th agreement?

5 A That's the one I was shown.

6 Q Let me ask you about when you felt that Brunswick
7 was committed to you. I don't think we finished that.
8 Was Brunswick committed to you on November 27th to accept
9 your score sheets?

10 A Did I believe we had an agreement?

11 Q I would like you to answer it my way.

12 A Yes.

13 Q It was committed?

14 A Yes.

15 Q You had a firm agreement?

16 A I believe so, yes.

17 Q And you didn't need anything more from Brunswick
18 for there to be a firm agreement, did you?

19 A For there to be a firm agreement, no.

20 Q I have asked you this question before, haven't I,
21 at a deposition?

22 A Yes, I did.

23 Q Did you make the same answer then?

24 A I don't think you asked the same question.

25 Q Well, did I ask you, and I'm reading from page 30

2 of the deposition which you gave and swore to April 24, 1974,
3 beginning at line 10:

4 "Q Exhibit G is dated December 1, 1972. Did Mr.
5 Kratzenberg confirm to you on December 1, 1972, that you
6 had an agreement with Brunswick Corporation?

7 "A Other than the original conversations which took
8 place on November 27th, no.

9 "Q In the original conversation which took place
10 on November 27th, did Mr. Kratzenberg confirm to you that
11 the agreement with Brunswick Corporation was firm?

12 "A He said he saw it -- obviously it was not firm."

13 Which is true, the answer you gave then or the
14 answer you gave today?

15 "A I think there is a misunderstanding. He said
16 he could not sign my agreement because he was cancelling
17 because he said that I had an agreement. He saw no reason
18 that I didn't have an agreement.

19 "Q You believed you had an agreement?

20 "A Yes, I did.

21 "Q But it was subject to something else, wasn't it?

22 "A I didn't think it was going to be subject
23 to anything else, no.

24 "Q You see no difference between the testimony
25 you gave at the deposition and the testimony you have given

2 now; is that correct?

3 A That's correct.

4 Q Didn't you tell us earlier in your testimony
5 here in this very courtroom that you were awaiting a
6 telephone call from Mr. Kratzenberg or that you were to
7 call Mr. Kratzenberg after November 27th?

8 A Yes, I did.

9 Q What was the purpose of that call?

10 A He had asked me to call him to make sure everything
11 was okay. He said he could foresee no problems, that he didn't
12 anticipate any problems and could I give him a call. I
13 gave him a call and he said everything is fine, I'll send
14 you the shipping information right after Christmas.

15 Q No problems with respect to what?

16 A Mr. Peabody's cancellation letter.

17 Q Because there had been no prior cancellation;
18 right?

19 A I didn't know if there was a prior cancellation.
20 I saw that cancellation.

21 Q Was Brunswick itself committed to you in August
22 of 1972?

23 A I felt it was committed to Brunswick --

24 Q I would like you to answer the question.

25 A I know. It is a tough one. I really don't know

1 rdh74

259 A
Kock-cross

226

2 how to answer that. I thought they were committing themselves
3 to me by having me committed to them but I don't know
4 how to answer it other than that way.

5 Q Didn't you tell them you needed a letter from
6 them on August 27th?

7 A To show advertisers, yes.

8 Q Wasn't it for yourself, so that you knew you had
9 a commitment from Brunswick?

10 A I really felt I did have a commitment.

11 Q You thought you had a binding agreement with
12 Brunswick; is that it, in August?

13 A In August?

14 Q Yes.

15 A Yes, I thought we had agreed that we would go
16 ahead for March. Yes, that's pretty binding.

17 Q As of November 27th you already had a binding
18 agreement since last August; is that it?

19 A An agreement between ourselves that we would
20 as honorable people be bound, you betcha.

21 Q And the November 27th letter was unnecessary
22 from your point of view?

23 A I wouldn't say that. It helped to bring into
24 closer perspective the smaller things of how many quantities
25 of the shipping instructions of that.

2 Q Weren't there some changes in your June 8th
3 proposal and your October 12th proposal?

4 A Yes, there were.

5 Q And these changes had not been effected by August,
6 had they?

7 A We had had discussions about those changes
8 by August, yes.

9 Q Wasn't the purpose of your sending Brunswick
10 the letter of October 12th to have them confirm to you that
11 this was the agreement?

12 A That these were the shipping quantities, that
13 these were the end and start dates, these are what I was
14 agreeing to, yes.

15 Q And didn't you ask Brunswick to sign the
16 October 12th letter under the space "Agreed to and
17 accepted, Brunswick Corporation"?

18 A I think I sent that for their look and see for when
19 I came to -- I sent this to them in advance of a meeting
20 which would be coming in November.

21 Q Did you know there would be a meeting in November
22 when you sent it to them in October?

23 A Bill had said there would be some sort of meeting
24 coming forth, yes. I didn't know it was going to be November,
25 no. I had written to him earlier and said I could come out in

1 rdh76

261 A
Kock-cross

228

2 September.

3 Q Isn't it a fact that you wrote the letter of
4 October 12th in response to Mr. Kratzenberg's letter to you
5 of October 10th which said that he had assumed that you were
6 not going forward?

7 A The cover letter? Yes, I did respond to him because
8 I thought I was going forward.

9 Q It wasn't that you wrote the October 12th letter
10 in anticipation of a meeting in November, was it?

11 A I think, as I had explained to him where I had
12 been in the Detroit area, I could come to Chicago, I was
13 going to have a lawyer draw up a draft of a finalized agreement.
14 I was sending it to him, I was waiting for him to call me
15 back and all of a sudden a letter comes in saying are we
16 going ahead and we were going ahead. I didn't understand
17 what he was trying to say to me.

18 THE COURT: Mr. Newman, when you come to a point
19 that is a suitable time to adjourn for the day, let's do that.

20 MR. NEWMAN: Yes, your Honor.

21 Q Isn't it a fact in a cover letter which accompanied
22 your October 12th letter you stated that this was a rough
23 draft of an agreement?

24 A I believe I might have used those exact words, yes.

25 Q Those exact words?

rdh77

262 A
Kock-cross

229

A Well, I have a hard time remembering every word I wrote.

Q. Therefore, this wasn't, the October letter did not evidence that you had an agreement by that time, did it?

A You want to read the rest of the letter?

Q I am talking about the cover letter, the one that you sent on October 12th.

(Pause)

MR. NEWMAN: I don't believe the cover letter is in evidence.

MR. BRECHTICH: It is in evidence as Exhibit 13.

MR. NEWMAN: May I have it, please?

MR. BRASHICH: Together with an attachment (handing)

MR. NEWMAN: Thank you.

Q Don't you say in Plaintiffs Exhibit 13, which is your letter to Mr. Kratzenberg of October 12th, "My lawyer has been working on this agreement and a rough draft is attached so that you may have time to look it over for final approval. My plans were and still are to fly to Chicago at your request after the 15th so that we may finalize this more detailed version of our initial agreement and proceed with any further details for shipping to your centers for the March, 1973, start."

A Can you read the first paragraph also?

2 Q Yes. "Received your letter and was somewhat
3 confused in that we have been going ahead since I first
4 visited you in June. My telegram and letter of August 12th
5 again indicated our firm commitment for starting March, 1973,
6 which you established for our initial agreement dated
7 June 8th for an annual delivery of 4.5 million color score
8 sheets and 30,000 plastic league telescore sheets."

9 This was not a firm commitment on their part,
10 was it?

11 A I felt it was.

12 Q This was a firm commitment on your part, it was a
13 draft, wasn't it?

14 A I was already committed.

15 MR. NEWMAN: Mr. Brashich, may I have the original
16 complaint you filed in the action?

17 MR. BRASHICH: I don't have it. I gave it back
18 to Judge Frankel's clerk.

19 Q Is it not correct in the complaint which you
20 originally filed in this court, the one that was filed on
21 May 2nd of 1973 you stated in paragraph 7, "On or about
22 November 27, 1972, plaintiff and defendant Brunswick entered
23 into an agreement." Is that not correct?

24 MR. BRASHICH: I object, your Honor, to the use
25 of the word "state" in that complaint.

rdh79

Kock-cross

2 THE COURT: That's the plaintiff's complaint,
3 isn't it?

4 MR. BRASHICH: Yes, your Honor.

5 THE COURT: Overruled.

6 Q Is that not what the plaintiff's complaint states,
7 that on or about November 27, 1972, you and Brunswick
8 entered into an agreement?

9 A If that is what the complaint says, that's what
10 it states.

11 Q Not before November 27th, 1972, on November 27,
12 1972.

13 A I don't think I would interpret it that way.
14 I would have interpreted that the other way. We finalized
15 the intent of the agreement.

10 MR. NEWMAN: I think we can break at this point.

17 THE COURT: All right. Let's plan to resume
18 at 10:15, ladies and gentlemen. I know we keep you waiting
19 sometimes but we do that only when it is unavoidable.

Let me ask you all to be on time nevertheless
and not keep each other waiting.

10:15.

(Jury excused)

24 THE COURT: While you are whiling away your evening
25 hours, Mr. Brashich, I think you are also going to have to

1 rdh80

232

2 redraft your requested instruction on the position you take
3 respecting formation of this contract. I want an instruction
4 which states in detail what materials the plaintiff claims
5 comprises the agreement in this case. The defendant may wish
6 to do some similar thing or may wish to wait until it sees
7 the plaintiff's formulation, but I don't think I am going
8 to leave it with the jury quite as general as you suggest
9 in your requests; that is, from various conversations and
10 letters. I want you to particularize, and perhaps you ought
11 to just list them as at least your assertion of what constitute
12 the agreement in the case.

13 MR. BRASHICH: Yes, sir.

14 THE COURT: All right, 10:15.

16 (Adjourned to October 9, 1974, at 10:15 A.M.)

18 ----
19
20
21
22
23
24
25

2 WINSTON E. KOCK, JR.,
3 Plaintiff,
4 vs.
5 THE BRUNSWICK CORP.,
6 Defendant.

73 Civ. 1947

7
8 New York, October 9, 1974;
9 10.30 A.M.

10 Trial resumed.
11 - -
12
13

14 THE COURT: Let's get the jury in.

15 MR. BRASHICH: Before the jury comes in, as
16 you requested, your Honor, I worked on the charges which
17 I am submitting to this Court at the present time. Yester-
18 day the Court had asked both Mr. Newman and myself as to
19 the indemnity concept between the advertisers and also
20 asked me, I believe, to put in the request to charge the
measure of damages that I would like to have the Court
charge to the jury. This is almost a shell game and
I am trying to put it into words so the Court can under-
stand and the opposing counsel can understand my concept.

21 Mr. Kock had expended --

22 THE COURT: I don't want to keep the jury wait-
23 ing for this. Let's finish with his examination.
24 I realize I have led you to this concern. I am not
25 apologizing for it. Let's continue to get the evidence

1 2mcp

267 A

2 in and we will talk about this later on.

3 (Jury present.)

4 THE COURT: Good morning.

5 W I N S T O N E. K O C K, JR., resumed, having been
6 previously sworn, testified further as
7 follows:

8 CROSS EXAMINATION CONTINUED

9 BY MR. NEWMAN:

10 Q Mr. Kock, on November 27 of 1972 did Brunswick
11 ask you to name your advertisers?12 A They asked for some of the names of the ad-
13 vertisers, yes.

14 Q Did you give them the names of your advertisers?

15 A I gave them some of the names, yes.

16 Q Did you give them all of the names?

17 A No, I did not give them all of the names.

18 Q Were you reluctant to give them all of the
19 names?20 A I did not have finalized contracts with all of
21 them at that time.22 Q But did you have a reluctance to give the names
23 of those with whom you had a finalized contract?

24 A No, I gave those names.

25 Q Did Brunswick ask you to name all of the ad-

1 3mcp

Kock-cross

2 advertisers that you had?

3 A I'm not sure if they said all. They said name
4 advertisers, yes.5 Q I would like to ask once more whether you did
6 have some reluctance in giving Brunswick the names of the
7 advertisers on November 27.8 A You mean reluctance as to the advertisers that
9 I had not yet --

10 Q Any advertisers.

11 A There may have been some reluctance from the
12 standpoint of -- I didn't have Carter Wallace at that time
13 committed to me or others committed. I may have been
14 reluctant to give them to Brunswick on that side. They
15 weren't committed to me.16 Q Were you reluctant, perhaps, because you didn't
17 feel that Brunswick was committed to you?

18 A Maybe I should have been.

19 THE COURT: You will have to speak up so that
20 the jury can hear you.

21 A Would you ask me the question again? I'm sorry.

22 (Question read.)

23 A No, I think there might have been a different
24 reason for the reluctance.

25 Q Didn't I ask you a similar question in your

2 deposition? Do you recall that?

3 A You asked me -- yes, you asked me a lot of
4 questions.5 Q Do you recall beginning at page 46, line 17,
6 of your deposition, Mr. Kock, the following:7 "Q Tell us what you told Brunswick about the
8 advertisers on November 27.9 "A Brunswick asked me who some of my advertisers
10 might be. I said the U.S. Army, Desenex, several others.
11 I was rather reluctant to give them the names of the ad-
12 vertisers because on November 27 I still didn't have that
13 final written contract, even though I was being assured
14 that I would have it."

15 Do you recall giving that answer?

16 A Yes, I probably did say that.

17 Q Which is the true answer, that you were reluctant
18 because you didn't feel you had contracts with advertisers
19 or were you reluctant because you didn't feel you had a
20 contract with Brunswick?21 A I didn't yet have a contract with all the other
22 advertisers, that is true.23 Q So the answer to what I just read to you that
24 you swore to previously is not true; is that correct?

25 A I think there is a difference in meaning, but,

2 you know, both may be true. I'm not sure what you are
3 trying to say.

4 Q It may be true, then, that you did not have
5 a firm commitment from Brunswick on November 27; is that
6 what you are saying?

7 A No, I'm saying that I did have a firm commitmen
8 from all of my advertisers on November 27.

9 Q I have read to you the statement. This is the
10 document that you have signed and sworn to, is it not,
11 the deposition?

12 A I did sign that deposition, yes.

13 Q You swore to it, didn't you?

14 A I swore to it by signing it.

15 Q And you gave that answer that I read, didn't
16 you, and I will read it again:

17 "I was reluctant to give them the names of
18 advertisers because on November 27 I still didn't have that
19 final written contract, even though I was being assured I
20 would have it"?

21 MR. BRASHICH: I object. That is not the tota
22 answer.

23 MR. NEWMAN: I have read one sentence from the
24 paragraph. I read the paragraph previously. I will be
25 glad to read it again.

2 THE COURT: You mean you read the total answer
3 before but that wasn't reread now?

4 MR. BRASHICH: No, he just read one particular
5 sentence of the answer. which was of three sentences.

6 THE COURT: You think the rest changes the
7 meaning?

8 Read it again.

9 Q "A Brunswick asked me who some of my
10 advertisers might be. I said the U.S. Army, Desenex,
11 several others. I was rather reluctant to give them the
12 names of the advertisers because on November 27 I still
13 didn't have that final written contract, even though I was
14 being assured I would have it."

15 THE COURT: I don't think for purposes of this
16 question, Mr. Brashich, that makes any difference at all.
17 What is the pending question?

18 Q Did there come a time when you submitted all
19 of the names of the advertisers to Brunswick?

20 A Yes, I did.

21 Q When was that?

22 A January, I believe, you know, whenever it was
23 that I knew who they were. When they were printing I sub-
24 mitted -- I called and I gave them.

25 Q You expected after you left on November 27

2 that you would be having a further telephone call with Mr.
3 Kratsenberg, didn't you?

4 A He had asked that I call him back, yes.

5 Q What was the purpose of your calling him back?

6 A For shipping information, for seeing how
7 Peabody had received ellation letter. That was it.
8 I did need the shipping i ormentation and quantities like
9 that.

10 I had another reason when I did call him that
11 came into play. I needed him to write Carter Wallace.

12 Q In other words, Mr. Kratzenberg asked you to
13 call him in a week or two?

14 A Yes.

15 Q So that he could write Carter Wallace and you
16 could remind him to write Carter Wallace?

17 A No, he didn't ask me. That is one of the
18 reasons I called him.

2 19 Q What in the December conversation was of
20 significance?

21 A I needed the letter. I needed the shipping
22 information.

23 Q Only because you needed the shipping informa-
24 tion?

25 A Not only because I needed the shipping informa-

1 mcp8 Kock-cross

2 tion.

3 Q Also because you wanted the Carter Wallace
4 letter?

5 A Yes, also.

6 Q You had a document which was given to you by
7 Brunswick on November 27, Exhibit P-15, didn't you?
8 Didn't you show that to Carter Wallace?

9 A Would Carter Wallace have known in fact that
10 it was in fact Brunswick? Same thing you are trying to
11 throw at me.

12 Q I can't hear you.

13 A You see --

14 THE COURT: You do have to speak louder. I
15 don't think the jury can hear you and if you want your
16 story to get to them you better say it so they can hear
17 it.

18 MR. NEWMAN: I thought it might be.

19 Q You say that Plaintiff's Exhibit 15 didn't
20 indicate it was from Brunswick?

21 A I wanted Bill to write to Carter Wallace at
22 Brunswick. Brunswick at Carter Wallace.

23 Q Isn't Plaintiff's Exhibit 15, the letter of
24 November 27, 1972, on the Brunswick letterhead?

25 A Yes. It is not addressed to Carter Wallace,

2 is it?

3 Q No, it is addressed to you.

4 And wasn't this sufficient for you to show
5 Carter Wallace that you had a contract?6 A It might have been. I don't know. I don't
7 know how Carter Wallace would have felt about it.

8 Q But you didn't feel it, did you?

9 A I didn't feel what?

10 Q That you had a contract?

11 A I did feel I had a contract and you know I felt
12 I had a contract.

13 Q Why didn't you show this to Carter Wallace?

14 A (No response.)

15 Q I would like to read to you again on this
16 question from the deposition that you gave, the one that
17 you swore to. I'm reading on page 30, beginning at
18 line 15:19 "Q In the original conversation which took place
20 on November 27 did Mr. Kratzenberg confirm to you that the
21 agreement with Brunswick was firm?"

22 "A He said he saw it" --

23 There is a hyphen indicating a hesitation.

24 "Obviously it was not firm."

25 That is your answer.

2 "Q When did it become a firm agreement?

3 "A Again, I would have to say when I talked with
4 him on the phone in the middle of December he confirmed
5 the agreement was okay and later, subsequent to that, or
6 after that, he then sent me a carbon copy which confirmed
7 everything to me to my satisfaction."

8 Which is correct, that you had a firm agreement
9 on November 27th or that you didn't feel you had a firm
10 agreement until he talked to you on the phone in the middle
11 of December?

12 "A I think I had a firm agreement at both times.

13 "Q Then the statement that you swore to at your
14 deposition is false, isn't it?

15 "A No, it is not false.

16 "Q May I read it to you again?

17 THE COURT: Mr. Newman, some of this you are
18 to leave for the jury.

19 MR. NEWMAN: Thank you, your Honor.

20 "Q Did you report to Mr. Brashich the sum of the
21 telephone conversation with Mr. Kratzenberg?

22 "A I don't believe that I did at that time.

23 "Q Did you have any writing from Brunswick at that
24 time which said that the obligations of Brunswick to use
25 all the score sheets would begin on March 1st?

2 A As of November -- as of December, did I have a
3 writing from Brunswick? No.

4 Q You are a meticulous individual in writing
5 letters and keeping accounts of things, aren't you?

6 A Yes, sir, I am.

7 Q Yet you didn't feel you needed anything from
8 Brunswick which said that they were going to begin accepting
9 all sheets on March 1; is that correct?

10 A Well, I kind of believed Brunswick was telling
11 me what the facts were and they were saying I had the
12 contract. I didn't seem to have any problem believing them
13 at that time.

14 Q And each and every other time when you wrote a
15 letter to Brunswick you confirmed a telephone conversation,
16 didn't you?

17 A No, I didn't write a letter everytime I had a
18 conversation with Brunswick.

19 Q What was the purpose that you asked Mr.
20 Kratzenberg to give the Carter Wallace letter, which is
21 Plaintiff's Exhibit 83?

22 A Carter Wallace had asked me to have Brunswick
23 write them a letter.

24 Q Plaintiff's Exhibit 83 talks about a 1973
25 bowling season. I'll read the first sentence:

1 mcp12

2 Kock-cross

3 "This is to advise that Winston Kock, who
4 represents himself, has an agreement with Brunswick to
5 furnish our 200 bowling centers in the United States with
6 the score sheets for the 1973 bowling season."

7 A Is there more in the letter?

8 Q I'd like to address your attention to the first
9 sentence which talks about the 1973 bowling season. Have
10 I read it correctly?

11 A Yes, you read the first sentence correctly.

12 Q What did you understand the 1973 bowling season
13 to be?

14 A 1973.

15 Q Was that the entire year?

16 A Carter Wallace was only buying from March to
17 September, 1973. March and September were certainly within
18 1973.

20 Q Didn't you know the 1973 bowling season wouldn't
21 begin until September, 1973?

22 A I knew no such thing. I didn't say 1973-1974
23 bowling season.

24 Q When you read the letter, Plaintiff's Exhibit
25 83, did you understand that you had an agreement with
Brjnswick beginning January 1, 1973?

A I had an agreement. I understood it beginning

2 in March. My advertising was sold beginning in March.

3 Q Did you understand then that the statement
4 contained in Plaintiff's Exhibit 83 was correct, that is,
5 that Winston Kock has an agreement with Brunswick to furnish
6 score sheets for the 1973 bowling season? That is beginning
7 January 1, 1973. Did you understand that to be correct?

8 A Did I -- he didn't say January, 1973, in his
9 letter. I could not have understood it to be January,
10 1973.

11 Q When was the contract with Brunswick to commence

12 A When was it to begin? March of 1973.

13 Q A specific date in March or just any old day?

14 A March, 1973.

15 Q Could you answer my question, please?

16 A Did you say a specific date in March, 1973?

17 Q Yes.

18 A My answer was March, 1973.

19 A THE COURT: He asked does it begin on a specific
20 day and the answer to that is yes or no.

21 THE WITNESS: No.

22 Q Any time during March of 1973; is that so?

23 A Yes.

24 Q That is how you sold your advertising, any
25 time during March of 1973?

2 A Yes.

3 Q March 30 would satisfy that?

4 A I sold my advertising for six months beginning
5 March of 1973.

6 Q As you understood it, if you started March 30,
7 that would be satisfactory; is that correct?

8 A If it was six months after March 30, yes.

9 Q I would like to refer you to paragraph 7 of
10 the complaint which was filed by you in this action.
11 I would like to read you from Paragraph 7 where you state
12 that:

13 "On or about November 27, 1972, plaintiff and
14 defendant Brunswick entered into an agreement, both orally
15 and in writing, wherein it was agreed by and between the
16 parties thereto that plaintiff would have the sole and
17 exclusive right to sell national advertising to be printed
18 on all bowling score sheets to be used on and after March
19 1, 1973, at the approximately 200 bowling alley centers
20 owned and/or operated by Brunswick."

21 You did state in the complaint which you filed
22 with the Court that the agreement was to begin with March
23 1; is that right?

24 A March 1 is March, that is correct.

25 Q Did you write to Brunswick at any time that

2 you were willing to accept other than an exclusive use of
3 your score sheets at the Brunswick centers after March 1?

4 A I think that needs a more specific question.
5 I can't answer that question yes or no. It is not phrased
6 right.

7 THE COURT: Why not? Did you write to them to
8 that effect or not? You did or you didn't.

9 THE WITNESS: I did.

10 THE COURT: Next question.

11 Q Isn't that Plaintiff's Exhibit 23, your letter
12 of February 8th?

13 A I have to see the letter.

14 Q Let me read to you from Plaintiff's Exhibit 23,
15 the fifth paragraph:

16 "Q This then is the major question still outstanding:
17 The local manager, for various reasons, the least of
18 which is his proximity to the local advertiser, is not in
19 a position to make the decision as to when to cease using
20 Peabody's score sheets. Therefore, the only solution
21 is a directive from Chicago that where there are local
22 advertising sheets still available they are to be used on
23 an alternate pad basis with the new sheets up to March 31,
24 1973."

25 Did you write that?

2 A Is there more involved there?

3 Q Did you write that sentence?

4 A Yes, I wrote that sentence with another one
5 following.

6 Q I am interested in whether or not you will
7 accept the use of other than your sheets after March 1.
8 It is correct that you would accept and did understand
9 that it would be acceptable to you that there be other
10 score sheets used in the bowling centers in the month of
11 March; is that correct?

12 A In the month of March?

13 Q Yes.

14 A That is correct.

15 Q Would that be giving the advertiser his money's
16 worth?

17 A It could be giving him his money's worth.

18 Q He wouldn't be getting his full March exposure,
19 would he?

20 A I'm afraid you are asking a question -- no, he
21 would not get a full March exposure. He would still get
22 a six-month exposure following.

23 Q When would it end? If you had started on an
24 alternating basis on March 1, a pad of your score sheets,
25 a pad of Peabody's score sheets and so on down the line,

2 when would it end?

3 A Such a need for alternating pads within the six
4 months would have ended for the advertisers for March 30.
5 the end of March, for a six-month period of time.

6 Q That would be six months from April 1, wouldn't
7 it?

8 A Or March 30.

9 Q Six months from March 30 would take you to
10 October, wouldn't it?

11 A That would be the end of September.

12 Q Yes. And you planned to start your new -- you
13 planned to sell the score sheets again to advertisers begin-
14 ning when -- September or October?

15 A The end of, beginning September. End of, begin-
16 ning of, however it worked.

17 Q How would you be selling advertising to people
18 for the same month of September where there were some of the
19 old advertisers who had score sheets that you agreed to be
20 used in the month of September?

21 A Where the old advertising ended the other
22 advertising would begin.

23 Q Isn't that what we were saying we had to do with
24 Peabody, where the old advertising ended the new advertising
25 would begin?

2 A Is that what you were saying to me about Pea-
3 body?

4 Q Yes.

5 A That isn't what you were saying.

6 Q The old advertising --

7 A You start me in March. Peabody ended any time.
8 I didn't care.

9 Q Isn't it true, Mr. Kock, the advertiser of the
10 standard brand names was looking for a number of exposures
11 and not necessarily numbered within any given period?

12 A That is definitely not true.

13 Q You weren't going to give that number of
14 exposures, were you, in a given period if you started on an
15 alternating pad basis in March?

16 A I'm sorry. Active was a new product. In
17 test it was very important --

18 Q Answer the question.

19 A -- for the six-month exposure. That is what
20 they were buying.

21 Q They weren't going to get a six-month exposure,
22 were they, if you started on an alternating pad basis?

23 A Are you saying they did get a six-month
24 exposure or they were not going to get it?

25 Q Answer the question.

2 A They would have gotten a six-month exposure,
3 yes.

4 Q Mr. Kock, do you recall in that deposition
5 when I was asking you a question and Mr. Brashich stated
6 at page 40, line 21:

7 "Let the record reflect that it was not only
8 a six-month exposure but also an appropriate number of
9 score sheets which would give the advertiser a vehicle
10 for exposure?"

11 Do you recall him making that statement?

12 A I'm sure he did.

13 Q Did you make any comment thereafter?

14 A I don't recall. If I did, I'm sure you will
15 refresh my memory.

16 Q No comment.

17 You accept that statement; is that correct?

18 A It is correct.

19 Q Was the U.S. Army particularly concerned about
20 the six-month exposure or were they concerned with a certain
21 number of exposures?

22 A Both.

23 Q Were they concerned with a particular six-
24 month exposure?

25 A Yes.

2 Q Which particular six-month exposure were they
3 concerned with?

4 A Six months, March to September.

5 Q Is that the agreement that you made with them,
6 six months, March to September?

7 A Yes, I did.

8 Q I would like you to look at Plaintiff's Exhibit
9 14, which is the N.W. Ayer & Son, Inc. document. N.W.
10 Ayer & Son you told me was the advertising agency represent-
11 ing the U.S. Army. Isn't it correct that the statement
12 on Plaintiff's Exhibit 14 under the heading "Insertion
13 Date" reads:

14 "1973: January 1 for six months"; is that not
15 correct?

16 A That is part of what is on that document, yes.

4 17 Q The statement is correct?

18 A The statement would be correct. Yes, it is.

19 Q Did you ever clarify with the Army that you
20 would not give them January 1 exposure?

21 A With the Army? No, that was -- N.W. Ayer,
22 I think you are asking.

23 Q I mean with N.W. Ayer. Did you ever clarify
24 with N.W. Ayer that you would not give them a January 1
25 exposure?

2 A Okay. Yes, I clarified with N.W. Ayer that
3 they would not start January 1.

4 Q Did N.W. Ayer have any objection to not starting
5 January 1?

6 A They paid me money later. I guess that means
7 they didn't object.

8 Q N.W. Ayer got what it thought it was entitled
9 to, didn't it?

10 A In March of 1973? Yes, they started or at least
11 it was supposed to start in March of 1973.

12 Q They haven't asked for their money back, have
13 they? Yes or no.

14 A No.

15 Q Now, on November 17, 1972, which is the date
16 of Plaintiff's Exhibit 14, you had not met with Brunswick;
17 is that correct?

18 A Met them in June of 1972. You mean November?
19 All right. No, I did not --

20 Q You had not had the November 27 meeting yet?

21 A No, I had not.

22 Q That is obvious. We can agree on that, can't
23 we?

24 A I think we can agree.

25 Q I would like to point your attention to the hand

1 mcp22

287A
Kock-cross

2 written note that appears on Plaintiff's Exhibit 14.

3 Is that your handwritten note in red ink?

4 A Yes, it is.

5 Q When did you have that conversation that is
6 referred to in the handwritten note?

7 A I believe the date is also with the handwritten
8 note.

9 Q It says "10/4 11.00 a.m." When did you have
10 the conversation?

11 A 10/4, 11.00 a.m.

12 Q Isn't the N.W. Ayer document, the contract,
13 Plaintiff's Exhibit 14, dated 11/17?

14 A Yes, it is.

15 Q Then you have the conversation with Dave before
16 or after 11/17.

17 A I had it before 11/17.

18 Q Yet Plaintiff's Exhibit 14 --

19 A Before 11/17.

20 Q -- is 10/4.

21 A Did I have something between 10/4 and 11/17?

22 Q No. Let me ask you a further question. Did
23 you type up Plaintiff's Exhibit 14?

24 A Did I type up Plaintiff's Exhibit 14?

25 No, I didn't type it up.

2 Q That was issued from Ayer?

3 A That came from N.W. Ayer.

4 Q And you wrote the note about a clarification
5 by Telcon 10/4 at 11.00 a.m. after you received Plaintiff's
6 Exhibit 14, didn't you?

7 A There was a problem there. Yes, I did call
8 him on 10/4.

9 Q But you wrote the note on the November 17
10 document after you received it?

11 A After I received it, yes.

12 Q That seems to be correct?

13 A Yes, that is correct.

14 Q And even though you said you had a conversation
15 on 10/4, that corrects the November 17 document -- the
16 November 17 document prepared by N.W. Ayer doesn't agree
17 with your conversation, does it?

18 A Of 10/4?

19 Q Yes.

20 A It was written 10/4. I'm confused.

21 Q I'm asking you whether in fact you had a con-
22 versation with Dave on 10/4 so that he could have put the
23 substance of the conversation on November 17?

24 A I see. Then there is dates wrong on there.

25 I can't write something yet on a letter I haven't received.

1 mcp24

Kock-cross

2 If that is what you are trying to say. Could I see the
3 letter?

4 Q When did you have your clarification with
5 Dave?

6 A After I received the letter, obviously.

7 Q You don't remember when you had your clarifica-
8 tion with Dave?

9 A No. After I would have received the letter.

10 Q Now, as of 10/4 did you have an agreement with
11 N.W. Ayer for advertising score sheets?

12 A I may have.

13 Q And pursuant to Plaintiff's Exhibit 14, whatever
14 the date, was your obligation then to supply score sheets .
15 bearing the advertisement of the U.S. Army?

16 A Was it my obligation? Yes, it was.

17 Q That is on November 17 or October 4, either one?

18 A Okay, yes. One of the two.

19 Q It was your obligation to undertake the cost
20 of printing those score sheets, your obligation to the Army
21 on November 17; is that correct?

22 A Did I have a commitment from the Army to me?

23 Yes.

24 Q Did you have a commitment to the Army that you
25 would -- when I say Army I mean N.W. Ayer -- supply them,

290 A
Kock-cross

1 mcp25

2 print up for them bowling score sheets containing their
3 advertisement?

4 A I felt I had, yes.

5 Q That was, of course, true when you met with
6 Brunswick on November 27?

7 A Yes.

8 Q Was it just as agreeable to Dave of N.W. Ayer
9 that the contract begin January as it was to begin in
10 March?

11 A No, I think Dave had a misunderstanding with
12 what the Army and I had agreed to. The Army had wanted it
13 for March. We had said March because that is when it
14 started.

15 Q You had a misunderstanding with N.W. Ayer?

16 A I didn't have a misunderstanding with N.W. Ayer.

17 Q They had the misunderstanding?

18 A N.W. Ayer may have had the misunderstanding.

19 Q They didn't want January, did they, they wanted
20 March; is that right?

21 A The Army and I had agreed to March.

22 Q They didn't want January?

23 A They may have also wanted January. They may
24 have loved to have any time. I don't know what they
25 wanted. I know what we agreed to.

2 Q Did you get the idea of approach N.W. Ayer on
3 behalf of the U.S. Army as to advertising before the
4 Peabody score sheet?

5 A No, I had already approached the Army about
6 a year before.

7 Q Did you know the Army was already advertising in
8 different areas on Walt Peabody score sheets?

9 A No, I did not know that.

10 Q Was the United States Army advertisement on the
11 sample score sheets that you showed to Mr. Kratzenberg in
12 January of 1972?

13 A I don't believe it was.

14 Q Who were the advertisers that you had shown on
15 this specimen score sheet?

16 A They were not advertisers. They were sample
17 products.

18 Q What were the names of the sample products?

19 A That was so long ago I don't remember all of
20 them.

21 Q Name some of them.

22 A I think there was an old Grand Dad, a perfume,
23 Arpege, something like that, a cigar, Robert Burns, a gaso-
24 line -- would that have been Mobil? I think there was an
25 airline. There were several others. There were eight
advertisers in total.

2 Q Of similar calibre, were they not; big-name
3 companies; isn't that correct?

4 A I don't know the definition of big. I'd say
5 they were acceptable.

6 Q Do you think Mobil is a good definition of
7 big; will you accept that definition?

8 A As being advertisers, yes; large spending
9 advertisers, yes.

10 Q Of course, none of these advertisers that you
11 showed on this specimen score sheet ultimately became
12 advertisers, did they?

13 A That was 1972?

14 Q Yes.

15 A January.

16 Q Will you answer the question?

17 A I don't know if I proposed that those would
18 become advertisers. I don't know. Do you have a copy
19 of those advertisers so I can reflect?

20 Q Did Mobil become your advertiser?

21 A Mobil did not become an advertiser at that time.

22 Q Did American Airlines become your advertiser?

23 Let's talk about November, about the score sheets you actual-
24 ly printed, the contract that you actually had, the ones
25 that you have introduced in evidence.

1 cp28

293 A

Kock-cross

2 A Mobil is not on this score sheet.

3 Q Arpege?

4 A Not on this score sheet.

5 Q Robert Burns?

6 A Not on this scoresheet.

7 Q Did you give Mr. Kratzenberg another specimen
8 score sheet at a later time?

9 A I gave him a sample of the score sheet that we
10 used in the market test.

11 Q When was that, by the way?

12 A That was the last week of June, first week of
13 July, the Gallup market test.

14 Q Who were the advertisers on the Gallup market
15 test?

16 A Gallup selected American Airlines, Mobil,
17 Brylcream, Robert Burns, B.F. Goodrich, Travelers
18 Insurance Company. I believe there was one more. There
19 were eight in total that Gallup selected.

20 Q These were advertisers of a high calibre,
21 weren't they?

22 MR. BRASHICH: I will object to the calibre
23 qualification.

24 THE COURT: What is the ground of your objection?

25 MR. BRASHICH: The qualification of calibre,

2 of high calibre.

3 THE COURT: Under the rules of evidence,
4 what is the ground of your objection?

5 MR. BRASHICH: That there is a characterization
6 and no foundation has been laid.

7 THE COURT: Overruled.

8 A Mr. Gallup selected --

9 Q Were these advertisers of a high calibre?
10 Yes or no?

11 A Yes.

12 Q These were big, national advertisers, weren't
13 they?

14 A Yes.

15 Q Ultimately when you printed and supplied the
16 score sheet, isn't it a fact that three of the eight spaces
17 were occupied by a merchandise selling venture, somebody
18 selling a football game for two or three dollars or scissors
19 for four dollars; is that correct?

20 A Yes.

21 Q Is that a national advertiser?

22 A I'd say they were nationally advertising the
23 Brunswick bowling centers, therefore they became a national
24 advertiser.

25 Q Is that the kind of national advertiser that

2 you had presented to Brunswick in January and in June?

3 A That is the kind of national advertiser?

4 I'm not sure if I follow your reasoning, but I guess they
5 would not be as large as those other national advertisers
6 in spending money.

7 Q Aside from them not being as large in spending
8 money, they were using the score sheets for a different
9 purpose. They weren't using the score sheets to expose
10 their name but to sell some merchandise.

11 A They were seeking to sell a lot of merchandise,
12 yes, they were.

13 Q Through the score sheets?

14 A Through the Brunswick bowling centers and the
15 score sheets, yes.

16 Q When Mr. Kratzenberg spoke to you about the kind
17 of advertisers that were to be on the score sheet, did he
18 tell you that there would be no advertisers who sold product
19 which competed with Brunswick?

20 A Yes.

21 Q And do you know whether Brunswick sells ice
22 cream in its bowling alleys and at the snack bars?

23 A They might in some of them. I'm not sure about
24 all of them.

25 Q Do you know that they have snack bars in their

1 cp31

2 bowling alleys?

3 A They do have snack bars in some of the bowling
4 alleys.

5 Q What is the business of Baskin-Robbins?

6 A They sell ice cream across the country from
7 their own stores.8 Q Isn't that in competition, then, with the ice
9 cream sold in the Brunswick bowling alleys?10 A I don't think so. I can't get Baskin-Robbins
11 ice cream at Brunswick bowling centers. Maybe Baskin-
12 Robbins makes me think ice cream and I go buy your ice
13 cream.14 Q You think Brunswick was happy to have Baskin-
15 Robbins advertising?

16 A They liked the looks of the score sheet.

17 Baskin-Robbins was one of the advertisers. I didn't hear
18 any complaint.19 Q When did you first tell them that you were
20 going to have Baskins-Robbins on there?21 A When the printing paper was ordered, January,
22 beginning of February, somewhere in that time period.23 Q After Brunswick had already terminated Peabody;
24 is that correct?

25 A Again, okay, yes, after that November 27

1 cp32

297 A
Kock-cross

2 termination letter to Peabody, yes.

3 Q Brunswick had no choice at that time?

4 A That is not a fast food operation.

5 Q Mr. Kock, your obligation was to supply paper
6 score sheets and plastic score sheets; is that correct?

7 A Yes, it was.

8 Q What about getting plastic score sheets? Did
9 you show your printer a specimen of another plastic score
10 sheet?

11 A Yes, I did.

12 Q Whose plastic score sheet did you show him?

13 A The one that was being used in Brunswick bowling
14 centers made by Walt Peabody.

15 Q Do you know the Walt Peabody plastic score
16 sheet that you showed them was thicker than the one you
17 ultimately supplied to Brunswick?

18 A I don't know whether it was thicker.

19 Q Did you pay attention to whether it was or was
20 not thicker?

21 A The printer said he would match it, so I guess
22 I didn't pay any attention beyond that.

23 Q Did you check whether the printer matched it?

24 A He is a good printer. I assume he was matching
25 it.

2 Q You wanted the printer to match the Walt Peabody
3 score sheet; is that correct?

4 A That is why I gave it to them, yes.

5 Q You wanted him to match it as far as thickness
6 and as to the kind of ink that was used as well; is that
7 correct?

8 A All that matching entailed, yes.

9 Q And if he didn't match it, has he breached his
10 agreement with you?

11 A No, he said he'd make it good.

12 Q But up to the point that he said he'd make it
13 good he breached it, didn't he?

14 A I don't understand the word "breach." I would
15 guess in your definition --

16 Q Did you tell the supplier anything about the
17 heat of the plastic, that is, the heat that the plastic
18 would be subjected to?

19 A I'm not sure if I did.

6 20 Q Did you know it would be subjected to a great
21 heat?

22 A Bowling centers have lamps, yes. The printer
23 knows bowling. I know bowling. There are lamps at
24 bowling centers, yes. Of course, I'm sure I knew that
25 there would be some heat.

2 Q There were lamps in the bowling centers that
3 would subject the plastic to great heat?

4 A Underneath the table that you keep score on.

5 Q How far underneath; could you indicate?

6 A A foot, two foot, somewhere underneath
7 (indicating).

8 There are mirrors and then they -- it is about
9 that far under (indicating).

10 Q Did you place your hand on the table to see how
11 hot it was?

12 A I don't think I went that far, no.

13 Q And do you know what implement was used to mark
14 the score sheet?

15 A The one that I saw at the bowling center was
16 a yellow grease pencil.

17 Q You knew these score sheets were to be re-
18 usable?

19 A Yes.

20 Q Did you inquire how the yellow score sheet
21 grease pencil was removed, that is, how the markings were
22 removed after each use?

23 A It was my understanding that they were washed
24 off.

25 Q Which did you think was more important, if any,

cp35

2 to your advertiser, the plastic or paper score sheet?

3 A I thought all, both were important to my
4 advertisers.

5 Q What is important to your advertiser is the
6 number of exposures; isn't that correct?

7 A Among other things, yes.

8 Q If the plastic score sheets received a greater
9 exposure than the paper, then the plastic score sheets
10 were more important to your advertisers; isn't that correct?

11 A Not really, because the coupons weren't on the
12 plastic score sheet. No.

13 Q As far as the other advertisers are concerned,
14 was it more important to them that they receive more
15 exposures on the plastic; were the plastics more important
16 to them?

17 A Both were equally important, and it is possible
18 that they may receive, because of the frequency involved
19 in league bowling, more exposures by the named person.
20 The paper score sheets might be seen by many other
21 individual persons. Both are therefore important to the
22 advertiser from the standpoint of net audience and
23 frequency of audience.

24 Q And if the heat fades the print on the sheet
25 so the advertiser's name could not be seen by the bowlers,

1 cp36

301 A
Kock-cross

2 the advertiser again is not getting what he bargained for?

3 A I'd say he sure wasn't.

4 Q Did Mr. Bersch of Lasky Printers present to you
5 various thicknesses of plastic for your selection?

6 A I would have to explain that one because --
7 yes, he did.

8 Q Did you make a selection from among the various
9 thicknesses?

10 A From the two different thicknesses he showed
11 me. Of course I did.

12 Q Just two different thicknesses?

13 A Because I had showed him two samples.

14 Q Do you recall what the thicknesses were by
15 measure of the gauge?

16 A Well, one consideration was the Cellophane
17 reusable that Mr. Kratzenberg had asked about. The other
18 was the thick kind that Peabody was using. We priced both
19 and found out that the thin Cellophane was unacceptable
20 in terms of contract.

21 Q Your contract with Brunswick was not for the
22 thin disposable, but your contract for Brunswick was for
23 the thick reusable; is that right?

24 A That is correct, yes, but at the time I was
25 asked about it I showed the thick reusable to Mr. Bersch.

1 cp37

2 It had not yet become only thick, so I was showing both
3 the Cellophane and the thick. This later became thick,
4 yes.

5 Q When you discarded the disposable and you
6 were dealing only with the thick plastic, did Mr. Bersch
7 show you different thicknesses of plastic for your selection?

8 A I'm not sure. I think we looked at different
9 sizes. Some of them could have been a little thinner or
10 thicker because we were trying to measure the different
11 sizes of the bowling table.

12 Q Did he quote you different prices for the
13 plastic depending on their thickness?

14 A No, he ended up quoting the one-price plastic
15 that he wanted.

16 Q Did he tell you more or less the cost if he used
17 thinner or thicker plastic?

18 A Yes, I'm pretty sure he would have said some-
19 thing like that, that is obvious.

20 Q He showed you different gauges of plastic for
21 your selection?

22 A I'm not sure if I really selected them. He
23 may have showed me different gauges. I said, "This is
24 the one I have got to match because this is the one I'm
25 using."

2 Q Didn't you hear Mr. Bersch testify that he
3 showed you various gauges from 8 to 14?

4 A Yes, he did. That is what he did.

5 Q And you ultimately chose No. 10?

6 A We selected one that we thought was the closest
7 to the one that Peabody had.

8 Q I would like to show you three score sheets,
9 plastic score sheets, which bear the name Walt Peabody on
10 them, and ask you if these plastic score sheets were of the
11 thickness of the sample that you supplied to Mr. Bersch?

12 A I would not be able to answer that. That was
13 1971. Whether Peabody was using the same thickness at that
14 time, I'm not sure. If you want me to say these are Walt
15 Peabody score sheets -- they have his name on them. Yes,
16 they do. I really can't say whether that is the same size
17 as the sample I got in 1971.

18 Q Where is the sample that you received in 1971?

19 A The printer had them, used them to match.
20 He gave them to the subcontract printer so that the sub-
21 contract printer could then match.

22 Q You saw the printer in 1971?

23 A Or the Summer of 1972.

24 Q Or 1973?

25 A 1973? No, I doubt that.

2 Q I would just like to show you the invoices,
3 Plaintiff's Exhibit 77. They are dated March 22, 1973,
4 and May 22, 1973, aren't they?

5 A For shipping?

6 Q That is the invoice to you.

7 A Shipping follows -- after you ship the bill gets
8 in a couple of weeks later. Those were the invoices for
9 the shipping.

10 Q If I showed you the last statement, would that
11 refresh your recollection as to when you saw it?

12 A I was seeing him well before that. The ship-
13 ment came in at a much later date. I already testified
14 to that.

15 Q Had you seen Lasky for the Brunswick score
16 sheets in 1971?

17 A No, I'm sorry, 1972. I used the wrong year.

7 18 Q I would like to turn to a question of the
19 numbering on the paper score sheets. Did you instruct
20 the printer that it was required to number each of the
21 separate score sheets consecutively?

22 A The full 2-1/2 million score sheets were to
23 be one to 1 million, one to 1 million, one to a half-
24 million, yes. That is a consecutive numbering.

25 Q Did you instruct him to deliver the score sheets

1 cp40 Kock-cross 272

2 in consecutive order?

3 A I instructed him to deliver them in consecutive
4 order by pad.5 Q But not consecutive order from pad to pad;
6 isn't that correct?7 A Not necessarily from pad to pad and carton to
8 carton.

9 Q Do you know how they were delivered?

10 A No, I do not.

11 Q Did you receive complaint from Brunswick?

12 A Did I receive complaint? One.

13 Q That complaint said that the pads were not
14 consecutive from carton to carton nor were the pads con-
15 secutive within each carton; is that correct?16 A I believe it said that we could correct this
17 in the future as --

18 Q I think you are answering something else.

19 Is my statement correct that they were not
20 numbered, according to the complaint, consecutively within
21 each carton nor numbered consecutively from carton to carton?

22 A That is what that complaint said, yes.

23 Q Have any of your advertisers asked for its
24 money back?

25 A No.

2 Q Have you received a complaint from the advertising
3 agency or anyone representing the United States Army?

4 A No.

5 Q As a matter of fact, you received only one
6 complaint; isn't that correct?

7 A Received in writing only one complaint, yes.

8 Q Which one was that?

9 A Baskin-Robbins.

10 Q Incidentally, you sold your advertisers the
11 exposure in 200 bowling centers, didn't you?

12 A In approximately 200 bowling centers of the
13 Brunswick Company, owned and operated bowling centers.

14 Q Were you using the term "approximately" when you
15 were speaking to the advertisers?

16 A Probably 200.

17 Q Exactly 200; isn't that correct?

18 A They could have had more. I used 200 as a number.
19 er. 200 was the number.

20 Q And you knew as of March 29, 1972, didn't you,
21 that Brunswick did not own and operate 200 exactly?

22 A I don't know if that is quite correct. They
23 did own and operate, I believe, 200 or more.

24 Q In the letter of March 29, which is Plaintiff's
25 Exhibit 2, there is listed all of the Brunswick centers

1 cp42

Kock-cross

2 and shows approximately 180; isn't that correct?

3 A It shows more than 180.

4 Q How many more?

5 A I don't know. There are a whole bunch of
6 bowling centers that Brunswick owns that -- 200, I believe.
7 It added more bowling centers as it went along and kept
8 sending me names.9 Q Didn't you testify 186 that you counted on
10 Plaintiff's Exhibit 2?

11 A That is a 1972 listing.

12 Q March, 1972?

13 A Okay, March of 1972 there may have been only
14 186. We are talking about a year later. Didn't you
15 add bowling centers?16 Q You were counting on Brunswick adding bowling
17 centers; is that right?18 A They told me they were going to be adding
19 bowling centers.20 Q Mr. Kock, did the Baskins-Robbins advertising
21 come to you through a friend?22 A Was I introduced to Baskins-Robbins through a
23 friend? Yes.

24 Q Who was that friend?

25 A Mr. Charles Carver.

2 Q Was Mr. Carver instrumental in helping you to
3 obtain the account?

4 A I believe his father owned a Baskins-Robbins
5 franchise in Michigan. He thought it would be a good place
6 for Baskins-Robbins to advertise. He put me in touch with
7 Baskins-Robbins. That is the way it happened, yes.

8 Q Is it a fact that the only complaint you
9 received was from Baskins-Robbins and that Baskins-Robbins
10 was introduced to you by a friend; isn't that correct?

11 A No. I have had another complaint besides that,
12 which, you know, is conversation.

13 Q Which complaint was that?

14 A The direct mail people complaint.

15 Q Did the direct mail people tell you that people
16 were complaining they weren't getting their scissors?

17 A No, they did not.

18 Q You have listed a number of items that you state
19 you expended based on this contract for entertaining potential
20 advertisers and the like?

21 A Potential advertisers before August --

22 Q You put in a certain number of costs. You
23 read yesterday from a little book and you said, "I had so
24 much expenses for entertainment."

25 What was the purpose of that entertainment?

1 A The purpose of all this entertainment, seeing
2 any advertiser, was to get that advertiser to buy advertis-
3 ing both for a start and in the future.

4 Q All of these people that you read off yester-
5 day under "Entertainment" were advertisers; isn't that
6 correct?

7 A They were advertisers or agencies or clients
8 or friends of people in advertising agencies -- some way to
9 get my name in so that I could show what product I had for
10 sale.

11 Q Was Mr. Brashich an advertiser?

12 A He is my lawyer.

13 Q Was he an advertiser?

14 A No.

15 Q Are you aware Mr. Brashich was listed under
16 your entertainment expenses that you seek to recover from
17 Brunswick?

18 A I don't believe -- he is listed in my book, but
19 I am not sure if he is totalled in the money that I wish to
20 receive from Brunswick.

21 Q He is listed in the book?

22 A He is listed in the book, excluded from the
23 money.

24 Q I note that you list expense of telephone?

2 A Yes.

3 Q Did you have one or two telephones at home?

4 A I did have one telephone.

5 Q That was your family telephone as well?

6 A Yes, my home telephone.

7 Q The one you still maintain?

8 A I still have the same number.

9 Q And you list expenses for a rental car, don't
10 you?

11 A Yes, I do.

12 Q Was this rental car used exclusively for the
13 business of advertising or was it also used for personal
14 use?

15 A It was used for the purpose of saving money
16 to get to see advertisers. It was cheaper to use a leased
17 car at the high prices for New York City than to go to
18 advertisers.

19 Q Did you own another car?

20 A No, I did not own another car.

21 MR. NEWMAN: Excuse me a moment, your Honor.

22 (Pause.)

23 MR. NEWMAN: I have no further questions.

24

25

2 REDIRECT EXAMINATION

3 BY MR. BRASHICH:

4 Q Mr. Kock, you have just been asked about the
5 letter which was sent to Carter Wallace, which is Plaintiff's
6 Exhibit 83.

7 Now, subsequent to January 5, 1973, did you
8 receive correspondence from Carter Wallace?

9 A Yes, I did.

8 10 Q Now, Mr. Kock, do you recall, as I believe you
11 testified, that you received a letter from Carter Wallace
12 on February 7?

13 A Yes, I did. This is the letter.

14 Q And does it mention any start dates there?

15 A Yes, it does.

16 Q Could you tell us what start date it mentions?

17 A "This is to confirm that we would be participat-
18 ing in the bowling score sheet program for Active for the
19 March-September period."

20 Q Now, Mr. Kock, you had received the commitment
21 from the United States Army some time during the month of
22 November; is that not a fact, sir?

23 A Yes, sir.

24 Q Prior to November 17, when you saw the advertis-
25 er, did you see the United States Army, or did you see

cp47

1 N.W. Ayer & Company?

2 A I saw the United States Army.

3 Q Who did you see at the United States Army?

4 A Margaret Reitinger, who was the advertising
5 woman-marketing specialist for the United States Army.

6 Q And she was an Army person or Army lady?

7 A She was a civil employee of the United States
8 Army, yes.

9 Q Where did she have an office, if you recall?

10 A Norfolk, Virginia, or Hampton Bays or Hampton
11 Beach or something in Virginia.12 Q Did you tell her March, '73, or did you tell her
13 January, '73?

14 A March, 1973.

15 Q Subsequent to that date did you have any con-
16 versation about March or January with anyone at N.W. Ayer?

17 A Yes, later I did.

18 Q When did you have that conversation and with
19 whom did you have that conversation at N.W. Ayer?20 A I believe I had it with a Dave Belshaw when I
21 received the incorrect start date on their invoice number.22 Q If you know, Mr. Kock, do you have the budget
23 of the United States Army for advertising during 1973?

24 A MR. NEWMAN: I object, your Honor.

2 THE COURT: Sustained.

3 MR. BRASHICH: I will make an offer of proof.

4 There has been some testimony elicited from Mr. Kock as to
5 the size of his advertisers, and this is what I am directing
6 this question to.

7 THE COURT: I understand your question, but I
8 think the jury will take notice that the Army is large.

9 MR. BRASHICH: Not the Army is large, your
10 Honor --

11 THE COURT: Let's proceed.

12 Q Do you have an advertisement on your sheet from
13 Carter Wallace? Would you term Carter Wallace an advertiser
14 of high calibre?

15 A Yes, I would.

16 Q And how would you term Baskin-Robbins - as an
17 advertiser of high calibre?

18 A Yes, I would.

19 Q Mr. Newman asked you about complaints and you
20 said that you had received a complaint from the direct mail
21 advertisers?

22 A Yes, I did.

23 Q Would you tell us what that complaint was?

24 A They could not understand why their responses
25 were so low versus their projected --

1 cp49

2 MR. NEWMAN: I object. His answer is a conver-
3 sation and I think he said a complaint.

4 THE COURT: No. Overruled.

5 Q Tell us what their complaint was.

6 A Their responses were low. They could not
7 understand why they were so low because 2-1/2 million score
8 sheets were supposed to be in distribution with the coupon
9 on them. I had to explain to them that in fact only 25,
10 26 of the 200 bowling centers were using the score sheets
11 so that they were not getting the responses because there
12 weren't 2-1/2 million in distribution being used, and they
13 said, "Gee, that might be a real problem," and it did later
14 become so.

15 Q How?

16 A The cost of those products has doubled or tripled
17 and they can't make any money and I can't make any money
18 on them and the score sheets were still being used and some
19 orders were still dribbling in. We are both losing money
20 on them.

21 Q Now, did there come a time when you spoke to
22 Mr. Kratzenberg in Brunswick and you told him the list of
23 advertisers?

24 A Yes, I did.

25 Q Did you name each and every one of the advertis-

2 ers for him?

3 A Yes, I did.

4 Q What did he say to you? Did he object to
5 Baskin-Robbins?

6 A No.

7 Q And you sent him a proof sheet of that particular
8 advertisement, did you not?

9 A Yes, I did.

10 Q And did he write to you telling you that Baskin-
11 Robbins was not acceptable?

12 A No, he did not.

13 Q You testified that you sent Mr. Bernie Rudo a
14 copy along with your March 1 letter of 1973?

15 A Yes, I did.

16 Q Did he complain to you about the Baskin-
17 Robbins advertisement being on the score sheet?

18 A No, he did not complain about Baskin-Robins
19 being on the score sheet.

20 Q Before this morning, did anyone else bring up
21 the fact that Baskin-Robbins was on the score sheet?

22 A No, they did not.

23 Q You testified that you had earlier conversations
24 with Mr. Kratzenberg in January and in June of 1972, did you
25 not?

316 A

1 cp51

Kock-redirect

2 A Yes, I did.

3 Q Did he at that particular time give you any
4 instructions as to who could go on that particular score
5 sheet?

6 A He told me certain advertisers he did not want,
7 yes.

8 Q Who did he tell you couldn't go on them?

9 A Fast Food franchises such as MacDonald's.

10 I believe there was some bowling equipment
11 stores that might carry bowling equipment that would be
12 in competition with the Brunswick bowling equipment.
13 He said he didn't really know if he wanted cigarettes. He
14 wasn't sure. But he knew he could not have liquor advertising
15 because it was prohibited by States.

16 Q Did he say anything about a coke drink or Coca-
17 Cola or Pepsi-Cola?

18 A Yes, he did; but we could not have a competitive
19 beverage and that Coca-Cola was their beverage in their
20 bowling center.

21 Q Did he say anything to you about ice cream?

22 A No, he did not.

23 Q When did you get paid by the Army, if you re-
24 call?

25 A I believe it may have been in March or early

1 cp52

Kock-redirection

2 May. I don't know. I'm not sure. You have to check the
3 date.

4 Q Finally, Mr. Kock, you had testified, had you
5 not, yesterday about certain expenses?

6 A Yes, I did.

7 Q And Mr. Newman again asked you about those
8 expenses, didn't he, this morning?

9 A Yes, he did.

10 Q Did you from the time that you testified to
11 the time this morning that you were on the stand go over
12 this cash book and put together in an unhurried fashion
13 the sums you had expended as reflected in this cash book?

14 A Yes, I did.

15 Q Was that done last night?

16 A Yes, it was.

17 Q I show you this particular cash book. When
18 you were doing this were you doing it like yesterday with
19 a piece of paper and a yellow pad or were you using an
20 adding machine?

21 A I used an adding machine.

22 Q Could you tell us in the various categories
23 how much your particular calculations add up to? Will
24 you tell us first the category?

25 A Yes.

2 MR. NEWMAN: Is this the period August 10,
3 1972?

4 MR. BRASHICH: August 10, 1972, through May 2,
5 1973.

9 A Answering service total, \$215; telephone,
7 \$1963.94; rent a car, \$975; apportioned rent of apartment
8 for office --

9 MR. NEWMAN: If your Honor please, I don't
10 believe that was testified to yesterday. I don't see how --

11 MR. BRASHICH: I will strike that, your Honor.
12 I will withdraw that.

13 A We don't need that.

14 Sales trips, \$958.24; printing, \$54,379.95;
15 tolls and gasoline expenses, \$315; miscellaneous, 100 --

16 MR. NEWMAN: I don't recall miscellaneous.
17 I don't know whether miscellaneous would be a proper ex-
18 penditure. I object to miscellaneous.

19 MR. BRASHICH: I will withdraw that, too, Mr.
20 Newman.

21 Q proceed, Mr. Kock.

22 A Entertainment, \$625.23.

23 Q Stop at that particular point, Mr. Kock.
24 With regard to those entertainment figures that you are
25 just testifying to, does that include the time you took me

2 out for lunch?

3 A It does not.

4 Q It only deals specifically with advertisers?

5 A Advertisers.

6 Q Proceed, Mr., Kock.

7 A Stationery, \$311.11; legal --

8 MR. NEWMAN: Objection, your Honor.

9 THE WITNESS: It is not the same one.

10 MR. BRASHICH: I submit that these were legal
11 costs incurred prior to May 2, 1973.12 MR. NEWMAN: These were legal costs, I would
13 think, that have to do with the claim against Brunswick.

14 THE WITNESS: No, I don't unfortunately --

15 THE COURT: Ask him what kind of legal costs.

16 Q What kind of legal costs did you have and with
17 whom did you incur them?

18 A I incurred them with you, Mr. Brashich.

19 Q Did you look at your cash book? Can you find
20 out the dates of payment to my firm, sir, and the amounts?

21 MR. NEWMAN: I will object.

22 MR. BRASHICH: I will withdraw the amounts
23 until such time as Mr. Kock testifies --

24 Q Could you give me the dates of payment?

25 A August 21, March 26.

2 Q August 21 of what year?

3 A 1972, and August 26 -- excuse me. August 21,
4 1972, March 26, 1973, March 27, 1973.

5 MR. BRASHICH: May I proceed, your Honor?

6 Has he said what they were for?

7 Q Can you tell me what those particular sums were
8 expended for?

9 A Yes, sir, for your helping me with contracts
10 and advertising for the bowling score sheet in terms of
11 advertisers and Brunswick in the time period as specified
12 by Brunswick.

13 Q Did this have anything to do with the legal fees
14 incurred in this litigation, Mr. Kock?

15 A No, I'm sorry, they didn't.

16 MR. NEWMAN: The dates of March 26, 27 are
17 obviously times when Mr. Brashich had been retained to
18 present a claim against Brunswick. I don't see how that
19 could in any way be chargeable to anything.

20 THE COURT: Is that the ground of the objection?

21 MR. NEWMAN: Yes.

22 THE COURT: I will allow it.

23 Q Proceed, Mr. Kock.

24 THE COURT: He hasn't given those amounts.

25 Q What were the amounts?

2 A Can I give the amounts? All right.

3 \$2750.

4 Q Proceed with the other things on the list that
5 you have.

6 MR. NEWMAN: Could he itemize which instead of
7 totalling these four days?

8 MR. BRASHICH: Three days.

9 THE COURT: Three days.

10 Why don't you give how much on which days?

11 THE WITNESS: On the 21st, \$250; on 3/26,
12 \$1500; and on 3/27, \$1000.

13 THE COURT: Have you got cost sheets, invoices
14 for those?

15 THE WITNESS: Yes, cancelled checks.

16 THE COURT: No. I said invoices.

17 THE WITNESS: I'm not sure if I do have exact
18 invoices. I was usually at Mr. Brashich's office and
19 typewriter.

20 THE COURT: I must say that as to those two
21 dates, it seems to me -- I was once a lawyer myself and
22 it sounds as though they may present some ground of objection
23 here. I have reference to March 26 and March 27. I'll
24 disallow March 27th. The jury will disregard it.

25 MR. NEWMAN: And March 26?

2 THE COURT: I will allow March 26.

3 THE WITNESS: I claim they were specifically --

4 THE COURT: Please.

5 Q Are there any other sums on your list there,
6 Mr. Kock?

7 A Sums not spent but owed, yes.

8 Q What are those sums?

9 MR. NEWMAN: Are these only within the time
10 period that you were referring to, August 10?

11 Q After the legal fees that you just testified
12 about, is there any other item in your cash book, Mr. Kock?

13 MR. NEWMAN: I would like to be sure that we
14 have this time period.

15 MR. BRASHICH: From August to May of 1972.

16 Q Is there a sum in your cash book, Mr. Kock
17 or --

18 MR. NEWMAN: It is a leading question.

19 MR. BRASHICH: Can I lead?

20 THE COURT: Yes, go ahead.

21 Q Is there a sum in your cash book for services
22 of Gallup Testing Company?

23 A Yes, there is.

24 Q What is the date of that bill, sir?

25 A The date of the bill is September, 1972, I

2 believe.

3 Q What is the sum, Mr. Kock?

4 MR. NEWMAN: If your Honor please, the testi-
5 mony is that these are services rendered in June of 1972.6 MR. BRASHICH: I submit that these are ser-
7 vices which were commenced in June, but the actual results
8 and the work was not done until subsequent to August and
9 was not submitted to --10 THE COURT: It is not a ground of objection.
11 Some people send out their bills at intervals after they
12 have done work.

13 MR. NEWMAN: I appreciate that.

14 THE COURT: You may cross-examine on that.

15 MR. NEWMAN: This is expense incurred prior,
16 your Honor.

17 THE COURT: I'm sorry. I sustain that.

18 Q Did you deduct --

19 MR. NEWMAN: I am sorry. He is just going to
20 have to deduct that specific amount and tell the jury what
21 the amount is. Your Honor told him he couldn't introduce
22 that.23 MR. BRASHICH: Allow me to finish my question.
24 I am not asking a specific amount.

25 Q If you deduct the sum in your cash book for

1 cp59

324 A
Kock-redirect

2 Gallup, and don't tell us what that sum is--

3 MR. NEWMAN: Thank you.

4 Q -- and if you deduct the sum which the Court
5 has disallowed, the March 27 payment for legal fees, and
6 if you deduct the sum that you had put in your --

7 THE COURT: Wait a second. You and Mr.
8 Newman are going to get together at the recess and do the
9 arithmetic.

10 MR. BRASHICH: No further questions.

11 THE COURT: Any recross?

12 MR. NEWMAN: I have no questions.

13 THE COURT: All right.

14 Just so counsel can do their arithmetic and
15 for other reasons, why don't you take ten minutes.

16 (The jury left the courtroom.)

17 THE COURT: All right, you may step down, Mr.
18 Kock.

19 (Witness excused.)

20 THE COURT: Why don't you gentlemen take those
21 numbers and give the totals to the jury.

22 (Recess.)

23 (Jury present.)

24 THE COURT: Do you have agreement on the numbers,
25 gentlemen?

2
3 MR. NEWMAN: Of course we can't verify every
item here. We have gone over the basic figures and Mr.
4 Brashich says it adds up to whatever the number is.
5 I'm just going to have to accept it. He has given me the
6 book to take home with me tonight if I have any problems.

7 THE COURT: We will tell the jury tomorrow if
8 you are able to agree by then.

9 You remember that, Mr. Brashich, if you will.

10 MR. BRASHICH: Yes.

11 THE COURT: You may proceed.

12 MR. BRASHICH: As my next order of proof I
13 should like to read the deposition of Mr. Gerald Oles, your
14 Honor. I am going to read the ladies and gentlemen of
15 the jury a certain deposition of Mr. Gerald Oles which was
16 held on June 13, 1974, at Youngstown, Ohio, before a David
17 R. Burton, a Notary Public, and the original of this
18 deposition is signed and sworn to.

19 THE COURT: I don't know if you all know this --
20 you probably do -- but a deposition is sworn testimony
21 taken before a trial, commonly in a courtroom or a lawyer's
22 office. The main difference between it and the testimony
23 you hear in the courtroom is that normally a judge is not
24 present, but it is given under oath and under certain rules
25 the deposition testimony may be used as evidence in a trial,

2 and that is what is happening now.

3 All right, Mr. Brashich.

4 MR. BRASHICH: Thank you, your Honor.

5 "Q Mr. Oles, what is your present occupation, sir?"

6 MR. NEWMAN: I'm sorry. I would like to know
7 where you are reading so I can follow it.

8 MR. BRASHICH: Starting at page 4.

9 "Q Mr. Oles, what is your present occupation, sir?

10 "A I am in the business of selling silver and gold
11 for investment purposes.

12 "Q How long have you been so employed?

13 "A Since February.

14 "Q And prior to February of 1973, were you employed
15 by the defendant, the Brunswick Corporation?

16 "A I was employed by them up until May 12th of
17 1973.

18 "Q And for how long were you employed by the
19 defendant?

20 "A Since August of 1967, I believe.

21 "Q What was your first position with Brunswick?

22 "A I was Assistant Bowling Center Manager.

23 "Q And where was that, sir?

24 "A That was at the Gabby Hartnett Recreation in
25 Lincolnwood, Illinois.

1 cp62

"Oles

2 "Q How long did you have that position with
3 Brunswick?

4 "A About six weeks.

5 "Q What was your next position or job with Bruns-
6 wick?

7 "A My next position was Center Manager, Bowling
8 Center Manager.

9 "Q Where, sir?

10 "A Brunswick King Pin Lanes in Cleveland, Ohio.

11 "Q Thereafter, what was your position with Bruns-
12 wick?

13 "A I was bowling center -- I left the company for
14 a short period of time.

15 "Q Was this on your own volition?

16 "A Yes. And then I came back as Center Manager at
17 Brunswick in Baden, Pennsylvania.

18 "Q How long were you so employed by Brunswick?

19 "A Pardon?

20 "Q How long were you employed in Baden by Bruns-
21 wick?

22 "A I was there approximately 20 months.

23 "Q After that, what did you do for Brunswick?

24 "A I was promoted to a larger center, larger
25 bowling center which was Brunswick Charger Lanes in Barberton.

1 cp63 "Oles

2 Ohio.

3 "Q And thereafter what did you do for Brunswick?

4 "A I was promoted to Regional Foods and Beverage
5 Manager for Brunswick Corporation.

6 "Q And after that, sir?

7 "A My territory was enlarged, and then from that
8 point I was promoted to Retail Merchandise Manager.

9 "Q After that, sir?

10 "A I was fired by Brunswick.

11 "Q I see.

12 "Now, all of these changes within the defendant's
13 corporate structure, were those promotions both in pay and
14 in responsibility?

15 "A Yes.

16 "Q Would it be a fair statement of fact, Mr. Oles,
17 to say that your employment history in the -- with the
18 defendant was an excellent one?

19 "A It would have to be based on promotions.

20 "Q Is it not a fact, sir, that you were the
21 individual most promoted within the Brunswick Bowling
22 Division during the period of time that you were employed
23 by them?

24 "A To my knowledge, that is correct. I know that
25 when I was put on that job they told me I had always been

1 cp64

"Oles

329 A

2 rated in the top 10 per cent as far as promotion ability
3 with the division.

4 "Q I see.

5 "Who was your immediate predecessor in the
6 last position that you had with Brunswick?

7 "A Bill Kratzenberg.

8 "Q When did you assume his position and his
9 responsibility?

10 "A February 15, 1973. That is formal take-over.

11 "Q When did you first meet Mr. Kratzenberg?

12 "A I had known Bill for a number of years. I
13 don't recall just exactly when. I met him first in Gabby
14 Hartnett Recreation. He was a management rep. He was a
15 sales rep for the bowling division for selling management
16 contracts to proprietors.

17 "Q Prior February 15, 1973, did you have any
18 occasion to discuss with Mr. Kratzenberg what the responsi-
19 bilities were of his position, which you then assumed
20 after February 15, 1973?

21 "A Yes. I believe that we discussed on the
22 surface some of the responsibilities of the job prior to
23 my interview with Mr. Bernie Rudo for that job.

24 "Q When did these discussions take place, Mr.
25 Oles?

2 "A I don't -- I couldn't give you the specifics
3 on them. I don't really --

4 "Q January, February of 1973?

5 "A Some time close to that.

6 "Q During those discussions prior to February 15,
7 1973, was there any discussion relating to the bowling score
8 sheets for the Brunswick bowling centers?

9 "A I don't recall.

11 10 "Q Now, once you had assumed the position that Mr.
11 Kratzenberg left on or about February 15, 1973, did you have
12 any discussions with him relating to the bowling score sheet
13 situation?

14 "A This was covered generally with the other
15 responsibilities.

16 "Q By the way, where did these discussions take
17 place?

18 "A I think our first discussion was at the time
19 Bill was in the hospital in Wheaton, Illinois.

20 "Q Now, Mr. Kratzenberg was hospitalized at this
21 time?

22 "A Yes.

23 "Q How long was he so hospitalized, if you know?

24 "A I don't recall specifically. Maybe a
25 week or two.

2 "Q Do you recall the reason why he was hospitalized?

3 "A He was in for a check of some sort, possibly.

4 I think it was related to a physical checkup in relation
5 to whether he might have some form of cancer or something.

6 I don't know whether that is entirely correct.

7 "Q Was it the reason for leaving the position that
8 he had?

9 "A No.

10 "Q Do you know what period of time Mr. Kratzenberg
11 was ill or ailing prior to his hospitalization?

12 "A I have no idea.

13 "Q Do you recall what Mr. Kratzenberg said to you
14 and what you said to him during those discussions that
15 were had at the Wheaton Hospital?

16 "A Not specifically.

17 "Q Was the name Winston E. Kock ever mentioned at
18 that particular time?

19 "A Well, at the time that he oriented me to the
20 position, some time between the time he was in the hospital
21 and the two weeks that he spent with me after being released
22 from the hospital, we did discuss the score sheet situation.

23 "Do you want me to go on?

24 "Q Yes.

25 "A Basically, I was basically told that we had a

1 cp67

332 A
"Oles

2 new supplier for score sheets and shown the score sheet
3 sample and told that Winston Kock was the man that I
4 would be working with in this area and that Walt Peabody
5 was being discontinued because of problems they had had
6 in the past with his people irritating our people in
7 the bowling centers and quality of score sheet, and the
8 idea was to go with National Advertisers where we wouldn't
9 have all this bother to the local center manager.

10 "Q And did he show you a copy of the new score
11 sheet which was going to be used?

12 "A Yes.

13 "Q And that was in early February of 1973?

14 "A Some time in February.

15 "Q And did he tell you when the new score sheet
16 was going to start to be used by Brunswick?

17 "A I don't recall. He must have covered that but
18 I don't recall specifically, you know. I can't bring it as
19 a point of memory. I know I was told to read the file.
20 I was shown where the file was and I reviewed the file.

21 "Q Now, did there come a time that you reviewed the
22 file on Winston E. Kock's bowling score sheets?

23 "A I reviewed the file on Winston Kock and Peabody
24 both.

25 "Q And that was in early February?

2 "A Some time in February.

3 "Q Now, when you reviewed the file did you come
4 across this letter, sir?

5 "Mr. Newman: Did you identify the letter?

6 "Mr. Brashich: The letter is Defendant's
7 Exhibit U for identification at an examination on January 28
8 1974.

9 "Mr. Newman: What is the date?

10 "Mr. Brashich: And the letter is dated
11 November 27, 1972, from the defendant Brunswick, by
12 William Kratzenberg, to Walter Peabody Advertising Services,
13 Inc.

14 "Mr. Newman: Thank you.

15 "A I recall reading the letter, yes.

16 "Q Now, at the time ghat you read the Peabody and
17 Kock file, did you come across any contract or agreement
18 with Walt Peabody Advertising Services, Inc. for the supply
19 of bowling score sheets for the year 1972-1973?

20 "A No, no.

21 "Q Subsequent to your taking the position on
22 February 15, 1973, up to the commencement of the Peabody
23 lawsuit, did you have any communications whatsoever of any
24 nature both written or oral with Walt Peabody Advertising
25 Services, Inc.?

"A No. The first part of the question again,

2 please?

3 "Q From the time that you took the job on February
4 15th?

5 "A Yes.

6 "Q From the time you took the job until Peabody
7 sued Brunswick, did you have any written or telephonic
8 communication with Walt Peabody?

9 "A I don't recall.

10 "Q During that particular period of time did you
11 have any written or telephonic communication with the
12 plaintiff, Winston Kock?13 "A I don't remember when my first communication with
14 Win was specifically. I mean, I couldn't give you a date
15 or I couldn't remember the first communication other than
16 the fact that Mr. Rudo told me that he had talked to Mr.
17 Kock and that I was to get in touch with him and take care
18 of him. That was part of my responsibilities. I was out
19 in the field, I believe, when this occurred.20 "Q And after this particular communication between
21 Mr. Rudo and Mr. Kock, did you have the opportunity to speak
22 to Mr. Kock?23 "A Yes, I called him and we talked about the score
24 sheets coming in, and I asked him or dates of, you know,
25 when they would arrive, that type, we had a general dis-

cussion. We introduced ourselves to each other over the telephone, and he said he would send me the timetables as to when the score sheets would arrive, which he did, as I recall, and I asked him not to communicate with Bernie any further on this matter because I was handling all the detail on it and I would be able to -- I would take care of it from there, which he did. He followed through.

"Q Now, during these conversations that you had with Mr. Kock, do you recall any specific time or times that these score sheets were going to be placed in the Brunswick bowling alleys?

"A It seems to me as, you know, as far as I can remember, they were supposed to be in the bowling centers for use by March 1st, and I don't know whether there was a contingency there or not -- I can't recall -- as to the fact that whatever was in use as far as Peabody sheets were supposed to be discontinued by April 1st or not. I don't recall exactly, but I know that the first, the first date that I can recall is that around the 1st of March we were supposed to use Mr. Kock's sheets.

"Q And did there ever come to your attention -- was it ever brought to your attention that Peabody was delivering bowling score sheets in large quantities to

1 cp71

336 A
"Oles"

2 your various bowling centers?

3 "A Yes. I don't recall the specific circum-
4 stances. It seems to me that I got a communication from
5 Win, whether it was via telephone or he sent a letter,
6 that a large number of score sheets had been delivered to
7 some specific center, which I don't recall. Win was
8 objecting to this. That's all I can tell you that I
9 recall, wherever it was.

10 "Q I show you Defendant's Exhibit M for identi-
11 fication from the examination held on January 28, 1974,
12 which is a letter dated February 8, from the plaintiff to
13 the defendant. In reading the file, when you took over
14 the position of the national merchandise manager, do you
15 recall seeing a copy of this letter?

16 "A Oh, yes.

17 "Q Now, I show you Defendant's Exhibit D for
18 identification from the examination of January 28, 1974,
19 which is an internal memorandum dated January 24, 1973,
20 from Mr. Kratzenberg to District Managers, Regional Managers
21 and B. Rudo, and ask you whether you had seen that particular
22 internal memo after you had assumed the position of national
23 merchandise manager?

24 "A Yes, I saw this memo.

25 "Q And I show you Defendant's Exhibit B for identi-

1 cp72

"Oles

2 fication from the same examination of January 28, 1974,
3 which is a copy of a letter dated January 5, 1973, from
4 William M. Kratzenberg, on behalf of the defendant
5 Brunswick Corporation, to Carter Wallace, and ask you
6 whether you had seen this particular document subsequent
7 to February 15, 1973?

8 "A After February 15 I saw this at some time.
9 I don't recall specifically when.

10 "Q Now, I show you Defendant's Exhibit E for
11 identification, which is a memorandum dated February 27,
12 1973, from you, Mr. Oles, to the District Managers, Regional
13 Managers and Bernie Rudo, and ask you did you send this
14 particular memorandum?

15 "A Yes, I sent this.

16 "Q Could you tell us the purpose of that memorandum?

17 "A To establish a clear communication, as I recall
18 it, as to what they could expect as far as score sheets.

19 "Q Is it not a fact then, Mr. Oleas, that it was
20 your understanding that Mr. Kock did in fact have an
21 agreement or a contract with Brunswick exclusively for
22 bowling score sheets commencing March 1, 1973?

23 "A That he did have an agreement with them?

24 "Q Yes.

25 "A As far as I know he had an agreement to furnish

1 cp73

"Oles

2 all centers in the United States with score sheets. That
3 was my understanding.

4 "Q Commencing March 1, 1973?

5 "A I don't recall the specific ramifications of
6 the agreement, but I know that, you know, as I related
7 previously, that I thought, you know, the target date was
8 like things were to begin commencing March 1st.

9 "Q Was it also your understanding that Brunswick
10 had terminated its agreement with Peabody, if there was one,
11 on December 1, 1972?

12 "A Yes, I saw the memo concerning this.

13 "Q And that was the Kratzenberg memo of November
14 27th?

15 "A I thought it was December something. It's not
16 here. There is a memo there somewhere.

17 "Mr. Brashich: Let's go off the record.

18 "(Discussion had off the record.)

19 "Q You have testified, Mr. Oles, that you had seen
20 a memo or a letter of cancellation or a document which you
21 had heretofore said you believe was in December?

22 "A Uh-huh.

23 "Q Of 1972?

24 "A Right.

25 "Q Now, I show you Defendant's Exhibit U for

1 cp74

"Oles

2 identification from the examination of January 28, 1974,
3 which is a letter dated November 27, 1972, from Brunswick
4 to Peabody, and ask you is this what you refer to?

5 "A Yes, this is the one I was referring to.

6 "Q Now, I bring to your attention Plaintiff's
7 Exhibit 16 for identification, a memorandum dated
8 December 21 from S.E. Irons, to Kratzenberg with regard
9 to the Peabody score sheets and ask you whether you had
10 seen that particular document subsequent or after February
11 15, 1973?

12 "A I saw this document, yes. I'm familiar with
13 it.

14 "Q Do you recall when you saw that document --
15 was it before or after the Peabody suit?

16 "A I don't recall exactly. Might have been when I
17 read the file. It might have been when Peabody filed the
18 injunction and I reviewed the file. It could have been
19 either of those times.

20 "Q After you had assumed the position of merchandise
21 manager in February of 1973, did you ever have any dis-
22 cussion with Mr. Kock as to the delivery of the score
23 sheets?

24 "A Yes, I had discussion with him. I had asked
25 him for schedules, which he sent, of when they should be

1 cp75

"Oles

2 arriving from the printer.

3 "Q And do you recall when those deliveries were?

4 "A No, I don't remember the dates. There were
5 over 200 centers. Well, not over 200 because we had 170
6 some I think in the United States, so it is impossible for
7 me to remember the dates or the centers.8 "Q Did you ever receive any communication, whether
9 written or oral, from Mr. Kock relating to the fact that
10 some of the centers had not responded as to their score
11 sheet needs?

12 "A Yes.

13 "Q And did you do anything about it?

14 "A Seems to me that -- I don't recall specifically,
15 but I think a memo was written asking them to send post-
16 cards in or to relate their needs to Mr. Kock.

17 "Q Do you recall when approximately this took place?

18 "A Not specifically. I couldn't give you the
19 exact date.20 "Q Now, did there come a time that Peabody sued
21 Brunswick?

22 "A Yes.

23 "Q Do you recall when that was?

24 "A I don't know the specific date.

25 "Q Just prior to the commencement of the lawsuit you

1 cp76

"Oles

308

2 had testified that you had sent out this February 27th
3 memorandum?

4 "A Uh-huh.

5 "Q Who received copies of this memorandum, if
6 you know?

7 "A Everyone that is on that copy list.

8 "A That is the District Managers and the Regional
9 Managers?

10 "A And Mr. Rudo.

11 "Q And Mr. Rudo?

12 "A These are the ones that are listed.

13 "Q And your office as merchandise manager was
14 located where, sir?

15 "A Was located on the third floor of Building G
16 in Skokie.

17 "Q I see. And where was Mr. Rudo's office at the
18 time?

19 "A Three or four doors down.

20 "Q Now, on February 27, 28 or 29 did you have any
21 conversations with Mr. Rudo relating to this memorandum?

22 "A I don't recall specifically.

23 "Q Did Mr. Rudo during the next two or three days
24 ever come to your office and say Brunswick doesn't have an
25 agreement with Win Kock, we have an agreement with Peabody?

342 A

1 cp77

"Oles

2 "A I don't recall any conversation.

3 "Q Did anybody, of all these people that got copies
4 of this memo, call you up and say, hold on there, we have
5 an agreement with Peabody, not with Kock?

6 "A Not that I can recall.

7 "Q On February 27th or immediately thereafter
8 what was Mr. Kratzenber's position with Brunswick, if you
9 know?

10 "A He was district manager.

11 "Q Did you send him a copy of that memo?

12 "A All district managers received a copy.

13 "Q Did he call you and tell you, 'Jerry Oles, we
14 do not have a contract with Win Kock, we have a contract
15 with Peabody?'

16 "A I don't remember him calling me.

17 "Q And is it not a fact that Mr. Kratzenber was
18 your predecessor in the position of general merchandise
19 manager of Brunswick?

20 "A That is correct.

21 "Q And is it also true to say, Mr. Oles, that the
22 individual in charge of bowling score sheets for Brunswick
23 is the national merchandise manager?

24 "A Yes.

25 "Q Is that one of the functions and one of the

1 cp78 "Oles

2 responsibilities of that position?

3 "A That's what it was at that time.

4 "Q Yet no one called you about this memo.

5 "What position does Mr. Rudo have with Bruns-
6 wick?

7 "A He's vice-president of operations for the
8 bowling division.

9 "Q And in the scheme of the internal operation
10 of Brunswick does he have any control or any authority
11 over who is to furnish Brunswick with bowling score sheets?

12 "A Certainly.

13 "Q In the event that Brunswick would change a
14 supplier in the bowling division, who would have the
15 authority to do so at the time that you were employed in
16 that position?

17 "A The national merchandise manager would have the
18 authority to do so, but by --

19 "Q Would he need the approval of Mr. Rudo?

20 "A He should have it.

21 "Q Now, I show you Defendant's Exhibit D for
22 identification which is the January 24th memo.

23 "A Uh-huh.

24 "Q And could you tell me to whom this memo was
25 directed, if you know?

1 cp79

"Oles

2 "A To the Bowling Center Managers, District Managers,
3 Regional Managers and B. Rudo.

4 "Q And that is the same Bernard Rudo who was in
5 charge of this bowling division, is it not?

6 "A That is correct, right.

7 "Q And was it standard operating procedure for
8 that particular division of Brunswick that these memoranda
9 would go to Mr. Rudo to keep him advised of what was trans-
10 piring in any given field of endeavor?

11 "A On most major areas of endeavor.

12 "Q Now, you had testified, had you not, Mr. Oles,
13 that you, upon assuming the position of national merchandise
14 manager, you did see a copy of this January 24th memo?

15 "A Yes, I recall seeing the memo. It was in the
16 file.

17 "Q Do you recall seeing it some time in February?

18 "A Yes, I recall, yes.

19 "Q You used this document, did you not, Mr. Oles,
20 to try and find out whether Peabody had a contract, whether
21 Win Kock had a contract, where you were going to get score
22 sheets for 1973-1974, this is one of the documents which
23 you saw, sir; is that not a fact?

24 "A Yes, I saw the document. In response to your
25 question, it was part of the overall picture that was in

1 cp80

2 "Oles

3 that file.

4 "Q And did you then come to the conclusion that
5 Winston Kock did have an agreement with Brunswick and that
6 it was to commence on or about March 1, 1973?7 "A Based on all the information that was available
8 to me it was my understanding that he was going to furnish
9 us score sheets.10 "Q Now, did there come a time that Mr. Kock did
11 send you or did send the various Brunswick bowling alleys
12 the score sheets?

13 "A Yes.

14 "Q To your knowledge, were they ever received?

15 "A We had some problems, which I called Win about,
16 but most of them were coming in. There were cases of not
17 score sheets coming in in some places, and Hal Flemins,
18 district manager in California -- they had not received
19 them and they were buying them from the local Brunswick
20 warehouse, but I related this to Win and I told Hal Flemins
21 to keep a record of the cost incurred and we would get to
22 Win on this.23 "Q Now, sir, do you have any interest in the
24 outcome of this litigation?

25 "A None whatsoever.

"Q Has anybody promised you anything for your

346 A
"Oles

1 cp81

2 testimony here?

3 "A Nothing whatsoever.

4 "Q Mr. Oles, you had testified that it was your
5 understanding that Mr. Kock had an agreement with Brunswick
6 commencing some time in March of 1973; is that right, sir?7 "A As I related it on previous testimony, based
8 on, you know, the detail that we covered.9 "Q Was this contract an exclusive contract in
10 your understanding and nobody else was supposed to have
11 bowling score sheets there?

12 "A Yes, as far as I know, as much as I remember.

13 "Q And was it for all of the bowling centers simult-
14 aneously, all of them at once?

15 "A In the United States?

16 "Q Yes.

17 "A Yes.

18 "Q Now, there came a time that Peabody sued Bruns-
19 wick and Kock, is that not a fact, sir?

20 "A Yes.

21 "Q And to your knowledge was this lawsuit settled?

22 "A Yes.

23 "Q And do you recall when that particular lawsuit
24 was settled?

25 "A I don't recall the exact date, no. I was

4 involved in it.

5 "Q I show you Plaintiff's Exhibit A for identi-
6 fication from the examination held on March 27, 1974, and
7 ask you whether that refreshes your recollection as to when
8 the lawsuit with Peabody was settled?

9 "A Yes. I sent this memo out.

10 "Q Was the lawsuit already settled at that time,
11 if you know?

12 "A I'm just trying to recall.

13 "Q Let me show you Plaintiff's Exhibit 17 for
14 identification from the examination held on March 27,
15 1974, and ask you whether that refreshes your recol-
16 lection?

17 "A I don't remember if the lawsuit was settled
18 at this time. This is a copy. What you are saying --
19 this is a copy of the agreement?

20 "Q Of settlement.

21 "A 14th day of March, the agreement of settlement?

22 "Q Yes.

23 "A So I would think I wrote this the following day
24 after we settled. That's what it looks like.

25 "Q So would it be a fair statement of fact, sir,
to say that the lawsuit was settled in approximately 12
days?

1 cp

"Oles

315

2 "A I don't recall when it was initiated.

3 "Q Was it initiated prior to your February --

4 "A See, what I am saying is I don't recall the
5 specific dates.

6 "Q Had Peabody sued Brunswick on February 27th when
7 you wrote that particular memo?

8 "A I don't think so. I wouldn't state for sure.

9 "Q Between February 27, 1973, and March 14, 1973,
10 the date of the settlement agreement, do you recall whether
11 there was any correspondence or communication in writing with
12 Mr. Kock?

13 "A With Mr. Kock? I don't recall.

14 "Q Was Mr. Kock advised of the settlement agreement
15 which had been made with Peabody?

16 "A Mr. Kock wasn't advised of anything on our behalf
17 until I asked him to come to Chicago.

18 "Q Do you recall when that was, sir?

19 "A I don't recall the specific date.

14 20 "Q Now, I show you a letter, a copy of a letter
21 dated March 27, 1973, written to Mr. Kock and signed by you
22 and ask you whether you have ever seen that particular
23 document which is Defendant's Exhibit BBB from the examina-
24 tion of January 27, 1974; have you ever seen a copy of that
25 letter before?

2 "A Oh, yes, I wrote the memo.

3 "Q Is it not a fact, sir, that that letter was
4 dictated and given by hand to Mr. Koch on March 27,
5 1973, after conference was held at which were present
6 yourself, Mr. Koch, myself and Mr. Irons at Skokie,
7 Illinois?

8 "A I don't remember giving that to you. I know
9 that you -- remember writing it.

10 "Q Was such a conference held at Skokie, Illinois?

11 "A Yes.

12 "Q And is that the meeting that you refer to that,
13 at which point Mr. Koch was first advised of the settlement
14 which was made with Peabody?

15 "A Yes.

16 "Q So that was approximately 13 days after the
17 settlement was completed; is that a fact, sir?

18 "A I don't know. It seems to me that I called you
19 immediately after we had agreed to -- it hadn't even been
20 written up with Peabody yet. His attorneys had been there
21 and Peabody had been in Skokie. It seems I called you
22 right after that and asked you to come in. So I don't
23 know about the time lapse, if that is of significance.

24 "Q Isn't it a fact that on March 16th you had a
25 conversation with Mr. Koch by telephone, and isn't it a fact

2 that during that particular conversation you had requested
3 Mr. Kock to come to Chicago on March 26th, which was there-
4 after, which was confirmed?

5 "A Yes, I did ask him to come in.

6 "Q And you had a meeting on March 26th?

7 "A I don't know if that is the specific date, but
8 I did ask him to come in and he did come in.

9 "Q And on that conversation on March 16th, did you
10 advise him of the settlement with Peabody?

11 "A Yes.

12 "Q Was that already an accomplished fact?

13 "A It was as far as I was concerned. I had been
14 given the okay by Mr. Irons and Mr. Rudo. I mean, we were all
15 in agreement that it was settled. We were going to live
16 up to the expiration dates as to the contract that had been
17 shown us by Peabody.

18 "Q During the settlement negotiations with Peabody
19 was Kock part of these at all?

20 "A No.

21 "Q Was he a named defendant in that case, to your
22 knowledge, sir?

23 "A To my knowledge -- I don't recall.

24 "Q I show you Plaintiff's Exhibit 8 for identi-
25 fication which you had previously testified to. Do you

1 cp

2 "Oles

3 318 .

4 recall when this was given to Mr. Kock?

5 "Did there ever come a time when Mr. Kock was
6 given a copy of Plaintiff's Exhibit 8?7 "A It seems to me, if I recall correctly, that
8 I gave you a copy of this when you visited us in Chicago.

9 "Q And, sir --

10 "A I'm not certain now, but whether -- we made up
11 morethan one of these because we reviewed this, but it seems
12 to me I furnished Mr. Kock with a copy of what we were going
13 to live up to with Peabody as far as expiration dates in
14 specific centers. Whether this is the particular copy
15 or not, I don't recall.16 "Q Now, I would like to show you a letter which you had
17 testified earlier on, and show you attached to it a number
18 of sheets. Would it be fair to say that these were the
19 termination dates which were transmitted with your letter
20 of March 27th?21 "A I don't know, because there was some mix-up
22 originally in verification. Peabody was claiming more
23 time on some of these things and that was the purpose of
24 bringing him in with the contracts to pin this down to
25 specifics.26 "Q On May 1, 1973. you were still the regional
27 merchandise manager, were you not?

2 "A Yes.

3 "Q And Brunswick was still in the business of
4 bowling, was it not?

5 "A Yes.

6 "Q And it had approximately 180 bowling centers
7 throughout the United States, had it not?

8 "A Yes.

9 "Q And these bowling scoresheets, these bowling
10 centers used score sheets, did they not?

11 "A Yes.

12 "Q Now, these 180 bowling centers, whose score
13 sheets were they using on May 1, 1973?

14 "A They were using Peabody's score sheets. I don't
15 know whose score sheets they were using, let's put it that
16 way. They were instructed to use Peabody's score sheets
17 because they were furnished with expiration dates, up until
18 date of expiration, and to use Mr. Kock's scoresheets upon
19 expiration. That was what the instruction was.

20 "Q But is it then a fair statement of fact that
21 not all of the bowling centers were using Mr. Kock's score
22 sheets?

23 "A Not all were using --

24 "Q Mr. Kock's score sheets?

25 "A Oh, yes, that's a fair statement because it is

2 obvious that they were furnished expiration dates and
3 they were not to use his score sheets where they had to live
4 up to Peabody's expiration dates. That's got to be a
5 fair statement. I'm sure some of them had to comply with
6 that.

7 "Q Now, subsequent to the institution of the
8 lawsuit by Mr. Peabody, during the discussions that you had
9 which terminated in the settlement agreement of March 14th,
10 did you have any conversation at that time with Mr. Kratzern-
11 berg?

12 "A Mr. Kratzenberg?

13 "Q Kratzenberg.

14 "A I don't remember.

15 "Q Do you know whether or not Mr. Rudo made any
16 conversation or communications with Mr. Kratzenberg in that
17 period March 2 or 3 and March 14th?

18 "A I don't know.

19 "Q Do you recall seeing any correspondence between
20 Mr. Rudo and Mr. Kratzenberg during that specific period of
21 time?

22 "A Not that I can remember.

23 "Q Well, sir, Mr. Kratzenberg was your immediate
24 predecessor?

25 "A Right.

2 "Q And he was in charge for at least a year prior
3 to February 15, 1973, of the position of national merchandise
4 manager, was he not?

5 "A Yes, as I recall it.

6 "Q And when the lawsuit was commenced by Peabody,
7 you had that position for only some 15 days, is that not a
8 fact?

9 "A Whatever the dates were between February 15th and
10 the commencement, yes.

11 "Q And Mr. Rudo was the person in charge of this
12 whole division, was he not?

13 "A Of the operations, yes.

14 "Q And is it also a fair statement of the facts,
15 sir, that Mr. Kratzenberg was in charge on a day to day
16 basis with both Peabody and Kock prior to February 15
17 1973?

18 "A From the staff position point of view I would
19 say, just as I was.

20 "Q But then to your knowledge you do not know
21 whether Mr. Rudo ever contacted Mr. Kratzenberg during
22 that period of time?

23 "A I couldn't say specifically. I don't know
24 specifically.

25 "Q And you don't recall speaking to Mr. Kratzen-

2 berg at that particular time?

3 "A At the time, I don't recall, I may have
4 spoken to him. I consulted with him and, you know,
5 covering many subjects, but I don't recall any specific
6 conversation.

7 "Q With regard to the lawsuit after March 2 or 3?

8 "A Yes. I don't recall anything specific.
9 I talked to him about a lot of things, you know.

10 "Q Once the lawsuit was commenced, did you search
11 the file of the Peabody and the Koch files for a contract
12 with Peabody?

13 "A Yes.

14 "Q Actual written contract?

15 "A Yes, I believe I did.

16 "Q And did you find such a written contract for
17 1972-1973?

18 "A With whom?

19 "Q With Peabody.

20 "A With Peabody?

21 "Q Yes.

22 "A There was nothing written in the file concerning
23 '72 and '73. If I recall correctly, there was a communica-
24 tion around 1966 which indicated initiation of Peabody's
25 service, and this had never been orally or, never had been,

1 cp

356 A
"Oles

323

2 no one had ever gone in writing, as I recall, to terminate
3 this prior to this November letter that was sent out,
4 so it was just a continuing, continuing thing.

5 "Q Showing you Plaintiff's Exhibit 2 for identification,
6 Plaintiff's Exhibit 3 for identification, Plaintiff's
7 Exhibit 4 for identification, Plaintiff's Exhibit 5 for
8 identification, and all from the examination of March 27,
9 1974, and ask you after February 15, 1973, did you have an
10 occasion to see these documents?

11 "A Yes. I don't remember how much of them I
12 retained, but, you know, upon looking at them they are
13 familiar to me.

14 "Q Would it be a fair statement of fact that
15 since July of 1972 there was correspondence about the
16 termination of the Peabody supply of score sheets?

17 "A According to those memos, yes."

18 I have nothing further.

19 May I have Plaintiff's Exhibits 7, 10 and 11?

20 MR. NEWMAN: In connection with the reading?

21 MR. BRASHICH: Yes, in connection with the
22 reading. You have them. They haven't been introduced as
23 yet. I have reference to Plaintiff's Exhibits 7, 10 and
24 11, which are your G, J and K.

25 Is there possibility of breaking for lunch

1 cp

"Oles 357A

323a

2 at this point, sir?

3 THE COURT: All right, let's take a recess and
4 let's come back at 2.25.

5 (Luncheon recess.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

2 A F T E R N O O N S E S S I O N

3 2.30 P.M.

4 (Jury present.)

5 MR. BRASHICH: At the present time, plaintiff
6 offers into evidence Exhibits 7, 10 and 11.

7 MR. NEWMAN: I have no objection.

xx 8 (Plaintiff's Exhibits 7, 10 and 11 received
9 in evidence.)10 MR. BRASHICH: With your leave, I would like to
11 read Plaintiff's Exhibit 7, or a portion thereof.12 (Mr. Brashich read from Plaintiff's Exhibits 7
13 and 11.)

14 MR. NEWMAN: Have you skipped the July 25?

15 MR. BRASHICH: Yes, I have.

16 MR. NEWMAN: That is one of the exhibits you
17 asked for.18 MR. BRASHICH: Yes. Are you objecting to my
19 Exhibit 11?20 MR. NEWMAN: I object to his reading of Exhibit
21 11 unless he reads 10. I think they ought to have been
22 handed to the jury. I ask that he read all three.23 THE COURT: You can read the other one if you
24 want to.

25 MR. NEWMAN: Thank you.

2 (Mr. Brashich read from Plaintiff's Exhibit 11.)

3 MR. BRASHICH: At the present time, your
4 Honor, under 43-B, plaintiff calls William Kratzenberg
5 to the stand.

6 MR. NEWMAN: If your Honor please, there were
7 certain portions of the deposition of Mr. Oles that I
8 would like to read.

9 THE COURT: You may.

10 MR. NEWMAN: May I do so at this time?

11 THE COURT: Yes.

12 MR. NEWMAN: I will read from the deposition
13 of the witness Oles, beginning at page 44, my questions of
14 Mr. Oles, beginning at the bottom of page 44:

15 "Q Mr. Oles, I would like to refer you to the
16 letter of March 27, 1973, which has been given a number
17 of Exhibit BBB, and which you have previously looked at
18 this morning. This is a letter from you addressed to
19 Mr. Kock. Will you tell me if you were asked by either
20 Mr. Kock or Mr. Brashich to give them this letter?

21 "A No, I don't recall being asked by them.
22 It was just part of the procedure to notify them of what
23 had occurred with Peabody. That is why I wrote it up,
24 as I recall.

25 "Q This letter was given" --

1 cp

360 A
"Oles

326.

2 And then I was interrupted by Mr. Brashich, who
3 stated:

4 "Mr. Newman, perhaps I can help you. I was present.
5 It was at the specific request of myself that this particu-
6 lar letter was written, and Mr. Kock. The wording and the
7 contents thereof were Mr. Oles' and were not ours. The
8 letter which we requested was not sent to us, but this
9 letter was the result of a specific request which we made
10 on March 26. I will so concede for the record.

11 "Q Does Mr. Brashich's statement refresh your
12 recollection?

13 "A Yes, it seems to me that they did ask me for
14 something now that he mentions this. They did ask me
15 for something that they could show their advertisers, if
16 that is correct, at the time of our conversation."

17 Page 46:

18 "Q Mr. Oles, I would like to show you a copy of
19 another exhibit in this case called Defendant's Exhibit YY,
20 which is a letter to Mr. Kock dated May 2, 1973."

21 Parenthetically, I will call the attention of
22 the Court to the fact that that is Plaintiff's Exhibit 32.

23 MR. BRASHICH: I will object to anything
24 parenthetical.

25 MR. NEWMAN: I will explain that YY, at the

2 time of the questioning, is the same exhibit that we call
3 Plaintiff's Exhibit 32.

4 THE COURT: He may do that. The objection
5 is overruled.

6 MR. NEWMAN: "Q I would like to show you a
7 copy of another exhibit in this case called Defendant's
8 Exhibit YY, which is a letter from you to Mr. Kock dated
9 May 2, 1973. Do you recall sending this letter?

10 "A Yes, I recall it.

11 "Q And do you recall the circumstances under which
12 you sent this letter, the reasons for which you sent the
13 letter?

14 "A I received a call from Bradley, Warren Bradley,
15 District Manager Warren Bradley, giving me some specifics
16 on the non-sequential orders which would be a deterrent
17 to security, to good registration, and asked him to docu-
18 ment the numbers and forward me the documentation, the
19 specifics, and that I would contact Mr. Kock and advise him,
20 which this particular memo is the result of.

21 "Q What purpose is it necessary that the numbers
22 on the bowling score sheet be in numerical sequence?

23 "A If they are not in numerical sequence we cannot
24 properly audit them.

25 "Q Is the lack of numerical sequence a matter of

1 cp

"Oles

328

2 serious consequence to you?

3 "A Absolutely."

4 Page 48:

5 "Q Looking at the exhibit I gave you, Box 23,
6 Normandy Lanes, how was it harmful to the operation of the
7 bowling center to have the score sheets numbered in this
8 manner?9 "A Well, first of all with gaps, whenever you
10 have gaps you are in a situation where you cannot maintain
11 absolute control over registration at time of receipt of
12 money. There is nothing to prevent whoever is at the control
13 counter from taking a box of sheets out of sequence, out
14 of their numerical sequence, taking the money and not
15 registering it and just keep that, using one pad. It
16 could be done on an alternate pad basis or continuous
17 basis. It is one of the cross checks used to insure that
18 the money gets into the cash register."19 Your Honor, certain documents were identified
20 during the course of Mr. Oles' deposition as read by Mr.
21 Brashich. At this time I would like to introduce into
22 evidence those documents that were identified in the
23 reading of Mr. Oles' deposition.

24 THE COURT: Go ahead.

25 MR. NEWMAN: I would like to introduce the

1 cp "Oles 329.
2 document that was mentioned at page 69 as Plaintiff's
3 Exhibit 16, which is our Exhibit S, and the document which
4 was mentioned at pages 36 to 37 as Plaintiff's Exhibit 8,
5 which is our Exhibit BB.

6 THE COURT: You are introducing them by the
7 defendant's designations now?

8 MR. NEWMAN: Yes, I am, unless your Honor feels
9 that it should be by plaintiff's designations.

10 THE COURT: I don't have any feelings on such
11 subjects. I just want to know what you wish to do.

12 MR. NEWMAN: I will give them by defendant's
13 designations.

14 THE COURT: All right.

15 (Pause.)

16 THE COURT: Is there any objection?

17 MR. BRASHICH: I object as to Exhibit S, your
18 Honor. May we approach the side bar on Exhibit S?

19 THE COURT: Yes.

20 (At the side bar.)

21 THE COURT: Yes, Mr. Brashich.

22 MR. BRASHICH: One moment, your Honor.

23 MR. NEWMAN: May I also direct your Honor's
24 attention to the reading of the Oles deposition with
25 reference to that particular document?

2 THE COURT: Mr. Brashich, you say you wanted to
3 come up.

4 MR. BRASHICH: I will not object to BB, your
5 Honor.

6 THE COURT: All right.

xx 7 (Defendant's Exhibit BB received in
8 evidence.)

9 MR. BRASHICH: My objection with regard to
10 this particular document is that it is a work product of
11 an attorney which in no way can bind the plaintiff.

12 THE COURT: I think that is right.

13 MR. NEWMAN: Yes, your Honor, but Mr. Brashich
14 introduced it himself when he read the deposition.

15 THE COURT: He had it marked for identification.

16 MR. NEWMAN: I appreciate that, but when he
17 read the deposition and he asked the witness about it,
18 when he asked the witness to draw a conclusion from that,
19 then I think --

20 THE COURT: Let me hear the pertinent part of
21 the deposition.

22 MR. NEWMAN: "Q Now I bring to your attention
23 Plaintiff's Exhibit 16 for identification, a memorandum
24 dated December 21, from S.E. Irons to Kratzenberg with
25 regard to the Peabody score sheets, and ask you whether

1 cp

"Oles 365 A

331.

2 you had seen that particular document subsequent or after
3 February 15, 1973?

4 "A I saw this document, yes. I'm familiar with
5 it.

6 "Q Do you recall when you saw that document?
7 Was it before or after the Peabody suit?

8 "A I don't recall exactly. Might have been when
9 I read the file. It might have been when Peabody filed
10 the injunction and I reviewed the file. It could have
11 been either of those times."

12 THE COURT: Yes. You mean the file includes
13 this. Where is the specific reference to this?

14 MR. NEWMAN: Mr. Brashich brought it to the
15 attention of Oles.

16 THE COURT: Read it.

17 MR. NEWMAN: Yes.

18 "Q Now I bring to your attention Plaintiff's
19 Exhibit 16." That is the document.

20 THE COURT: That is this?

21 MR. NEWMAN: Yes, that is the document.

22 MR. BRASHICH: I just asked whether he had seen
23 it before.

24 THE COURT: Did you say he drew that conclusion
25 from this document?

2 MR. NEWMAN: And Oles answered: "I saw this
3 document, yes, I'm familiar with it."

4 THE COURT: Yes.

5 MR. NEWMAN: Then it continues:

6 "Q Do you recall when you saw that document?

7 Was it before or after the Peabody suit?

8 "A I don't recall exactly. Might have been when
9 I read the file. It might have been when Peabody filed
10 the injunction and I reviewed the file. It could have been
11 either of those times."

12 What Mr. Brashich was doing was leading up to
13 the memorandum of February 27.

14 THE COURT: Yes, but I'm going to sustain the
15 objection. I don't think you can get this in. It is
16 legal opinion from that kind of foundation.

17 (In open court.)

18 THE COURT: All right, does that complete the
19 Oles deposition?

20 MR. NEWMAN: Yes, it does.

21 THE COURT: And things incident to it?

22 You are calling Mr. Kratzenberg; is that it?

23 MR. BRASHICH: Mr. Kratzenberg, your Honor, as
24 an adverse witness.

25 THE COURT: Let's proceed.

2 W I L L I A M M A R T I N K R A T Z E N B E R G ,

3 called as a witness on behalf of the plaintiff,

4 being first duly sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. BRASHICH:

7 Q Mr. Kratzenberg, in June of 1970 were you
8 employed as the merchandise manager of the Brunswick
9 Corporation?

10 A No, I was not.

11 Q Were you employed in June of 1972 as the
12 national merchandise manager of Brunswick Corporation?

13 A Yes.

14 Q In June, and I will appreciate if you answer
15 these questions yes or no, in June of 1972, to your knowledge,
16 did the Brunswick Corporation have a written contract with
17 Walt Peabody Advertising, Inc.?

18 A No.

19 Q Subsequent to June, 1972, through March of 1972,
20 did the Brunswick Corporation have a written contract with
21 Walt Peabody Advertising, Inc.?

22 A I'm confused as to the definition of a written
23 contract.

24 MR. BRASHICH: Will the reporter read the
25 question again?

1

cp

2

THE COURT: Now, it won't help. We have lots

3

of lawsuits over that. That confuses lawyers and judges.

4

You will have to ask him some other question.

5

Q From June of 1972 to March of 1973, did you

6

have in your possession a piece of paper upon which was

7

affixed a signature of someone acting on behalf of

8

Brunswick Corporation and also a signature of someone

9

acting on behalf of Walt Peabody Advertising, Inc.?

10

A No.

17

11

Q In January of 1973 did you from your personal knowledge know what Brunswick's commitments were to Walter Peabody Advertising, Inc.?

14

A I knew what they were from the respect that Peabody was selling advertising on an on-going basis in the various bowling centers for a 12-month period.

17

Q You knew that?

18

A Yes, sir, I did.

19

Q Did you in January or February of 1972 tell Peabody that you were going to live up to your legal commitments that you had with them?

22

A No, I did not.

23

Q Did you intend in January or February of 1972 to live up to those legal commitments, Mr. Kratzenberg?

25

THE COURT: Do you mean 1972?

2 MR. BRASHICH: 1973.

3 Q In January-February, 1973, did you intend to
4 live up to your legal commitments to Peabody?

5 A I think I have --

6 Q The question I asked before was also relating to
7 1972.

8 I withdraw that.

9 I am now saying with regard to 1973, January,
10 did you intend to live up to your legal commitments to
11 Peabody?

12 A Yes.

13 Q You did intend to do so?

14 A Yes.

15 Q Did you communicate that particular fact to
16 Peabody?

17 A Yes.

18 Q And how did you communicate that fact to Pea-
19 body, sir?

20 A I believe it was conveyed to him in an August
21 letter.

22 Q You conveyed it to him, sir, in January, 1973,
23 that you decided or you had the intent to live up to your
24 commitment in August of what year?

25 A 1972.

2 Q So in August of 1972, sir, it is your testimony
3 that you said to Walt Peabody, "Yes, in January I intend to" --

4 THE COURT: No. No, let's go on to something
5 a little less metaphysical.

6 Q To your knowledge, sir, did Brunswick in fact
7 live up to the commitment to Walter Peabody in January,
8 February and March of 1973?

9 A To the extent of my knowledge, they did.

10 Q Did Walter Peabody sue Brunswick, if you know,
11 sir?

12 A I don't know.

13 Q You don't know?

14 A I knew there was --

15 THE COURT: He is telling you legally, and the
16 correct answer, I assume, is that his knowledge is hearsay
17 and if you need him to prove that you are in trouble.

18 Let us proceed, please.

19 Q On November 27 did you write a letter to Walter
20 Peabody Advertising?

21 A Yes.

22 Q I show you Plaintiff's Exhibit 16 in evidence
23 and ask you if that is a copy of the letter that you had
24 written to Walter Peabody?

25 A Yes, it is.

2 Q Did you in this letter state to Walter Peabody,
3 "Accordingly, as requested in your letter of July 25,
4 1972, we are hereby giving you notice of the termination
5 of all commitments to use score sheets supplied by you
6 after March 1, 1973."

7 Did you say that, sir, in your letter?

8 A Yes.

9 MR. BRASHICH: No further questions.

10 MR. NEWMAN: If your Honor please, I would
11 like to reserve my questioning of Mr. Kratzenberg for the
12 time I call him on direct, except for one question.

13 THE COURT: You may do that.

14 CROSS EXAMINATION

15 BY MR. NEWMAN:

16 Q Mr. Kratzenberg, what was your purpose in
17 writing Plaintiff's Exhibit 16, the letter dated November
18 27, to Peabody?

19 A The purpose was to try to draw out of Mr.
20 Peabody the exact termination of the advertising contracts
21 they had throughout the various bowling centers.

22 REDIRECT EXAMINATION

23 BY MR. BRASHICH:

24 Q You were trying to draw out from Mr. Peabody
25 the various termination dates of the Peabody services in

2 your various centers; is that what you said, sir?

3 A Something close to that.

4 Q I show you Plaintiff's Exhibit 16 in evidence
5 and ask you if you can show me, the Court and the jury
6 anywhere where you used language where you are trying to
7 elicit the termination dates of Walter Peabody Service in
8 the various bowling centers. Please read it, sir.

9 A I'm sorry. It is not spelled out in this
10 letter in that fashion.

11 Q So it is not there?

12 A That is right.

13 MR. BRASHICH: No further questions.

14 RECROSS EXAMINATION

15 BY MR. NEWMAN:

16 Q Did Mr. Peabody reply to your letter of
17 November 27?

18 A Yes, he did.

19 Q In reply did he state to you that he had various
20 termination dates?

21 A Yes, he did.

22 Q I show you a letter dated November 30, 1972,
23 and ask you if this is the letter that you received from
24 Peabody?

25 A Yes, it is.

1 cp
2 MR. NEWMAN: I would like to offer it as
3 Defendant's Exhibit Q.

4 MR. BRASHICH: No objections, your Honor.

5 (Defendant's Exhibit Q received in
6 evidence.)

7 MR. NEWMAN: May I read from Exhibit Q, your
8 Honor, or may I read the entire exhibit?

9 THE COURT: Yes.

10 (Mr. Newman read from Defendant's Exhibit Q.)

11 Q Incidentally, Mr. Kratzenberg, what was the
12 date of the last inventory that you had?

13 A The one that I can recall is November, 1971.

14 MR. NEWMAN: I have no further questions at this
15 time.

16 REDIRECT EXAMINATION

17 BY MR. BRASHICH:

18 Q This letter, Defendant's Exhibit Q, is dated
19 November 30, is it not? There is no date stamp on it.
20 Do you recall when you received it, sir?

21 A I recall receiving it somewhere in early December.

22 Q What was the next written communication that
23 you received from Walter Peabody as to this particular
24 letter?

25 A I can't recall receiving any.

2 Q Did you ever reply to this letter?

3 A No, I did not.

4 MR. BRASHICH: No further questions.

5 MR. NEWMAN: Thank you for the present, Mr.
6 Kratzenberg.

7 THE COURT: Mr. Kratzenberg, when you wrote that
8 letter to Peabody on November 27, 1972, stating you were
9 terminating Peabody's score sheets as of March 1, 1973,
10 am I correct that you gave a copy of that to Mr. Kock?

11 THE WITNESS: He read that letter in our
12 office.

13 THE COURT: You showed it to him?

14 THE WITNESS: Showed it to him and discussed it.

15 THE COURT: Did you tell him that the purpose of
16 it was to draw the termination from Peabody?

17 THE WITNESS: Yes.

18 THE COURT: Did you tell him that when you gave
19 him that letter?

20 THE WITNESS: Yes.

21 THE COURT: You are positive?

22 THE WITNESS: Sure.

23 THE COURT: Anything else, gentlemen?

24 MR. BRASHICH: Not from Mr. Kratzenberg, your
25 Honor.

2 THE COURT: All right, thank you for the
3 present.

4 (Witness excused.)

5 THE COURT: Go ahead, Mr. Brashich.

6 MR. BRASHICH: I would like to recall at the
7 present time, with the Court's leave, Mr. Kock, in view of
8 the testimony just elicited by the Court.

9 MR. NEWMAN: I have no objection. It was your
10 idea to call Mr. Kratzenberg, not mine.

11 MR. BRASHICH: Thank you, sir.

12 Mr. Kock.

13 W I N S T O N E. K O C K, J R., recalled as a witness
14 in his own behalf, having been previously sworn,
15 testified further as follows:

16 DIRECT EXAMINATION

17 BY MR. BRASHICH:

18 Q Mr. Kock, during your November 27, 1972, meeting
19 with Mr. Kratzenberg, did he ever tell you that the purpose
20 of writing the letter to Mr. Peabody was to elicit or get
21 termination dates for the various centers?

22 A No, he did not.

23 Q What did he say to you with regard to the
24 November 27 letter to Mr. Peabody that he showed you?

25 A He was sending this letter to Mr. Peabody to

1 CP.

Kock-direct

342.

2 cancel Mr. Peabody.

3 MR. BRASHICH: No further questions.

4 CROSS EXAMINATION

5 BY MR. NEWMAN:

6 Q Didn't Mr. Kratzenberg ask you to call him in
7 a week or so following the mailing of the letter to Peabody?

8 A Yes, he did.

9 MR. NEWMAN: I have no other questions.

10 THE COURT: All right, thank you, Mr. Kock.

11 (Witness excused.)

12 MR. BRASHICH: Plaintiff rests, your Honor.

13 THE COURT: We will give the jury about ten
14 minutes.

15 (The jury left the courtroom.)

16 THE COURT: Before I hear motions, let me say
17 that a conflict like the one that appeared in the last five
18 minutes in the testimony in my courtroom is always a source
19 or concern to me. I may refer the page or two of Mr.
20 Kratzenberg's and Mr. Kock's testimony to the United States
21 Attorney for the consideration of perjury prosecution.
22 If the witnesses who testified, Mr. Kratzenberg and Mr.
23 Kock, wish in the next few minutes to reconsider their
24 testimony in that light, they are invited to do so, and they
25 are to let me know. Otherwise, with a conflict that vivid,

2 based on my own hearing of this testimony and my own
3 views about credibility, I think the subject is one that
4 may warrant further investigation for criminal purposes.

5 Do you have motions, Mr. Newman?

6 MR. NEWMAN: Yes, your Honor, I do.

7 Your Honor, I have two motions. The first
8 motion is to strike so much of the testimony as relates to
9 the expenditures made by Mr. Kock both to the printer and
10 all of the other expenditures. The basis of my motion is
11 the failure to establish the reasonable value of these
12 expenditures. Mr. Kock tells us he spent some \$54,000
13 for printing. That is a substantial sum of money, but
14 there is no one, even though we have a printer on the stand,
15 who has testified that this was the reasonable value of
16 this particular work, labor and services. Before any
17 defendant could possibly be held liable for the payment of
18 such sum, that sum would have to be something that would be
19 reasonably expended. It could not be anything that Mr.
20 Kock should in his own desire wish to pay to a third party.
21 If there is a measure of damages where Mr. Kock is to
22 recover expenditures, those expenditures have to be such
23 that are correct and proper, correct and proper for the
24 nature of what he wished to accomplish.

25 We do not have literally a scintilla of

2 evidence with respect to the reasonable value of the ser-
3 vices and the furnishing of these goods, even though there
4 was an opportunity to have that reasonable value set forth,
5 an opportunity, because the printer was here. None was
6 offered to your Honor.

7 The same motion applies to all of the other
8 items, the miscellaneous entertainment items, the mis-
9 cellaneous expenditure of legal fees, the expenditures for
10 the multitude of other legal items, the special stationery
11 and supplies, the multitude of other small items that Mr.
12 Kock seeks as a measure of his damages. Under those circum-
13 stances I move to strike those exhibits that relate to
14 expenditures made by Mr. Kock, specifically the printing
15 invoices, the printing estimates and the testimony that
16 relate to the cost of printing and Mr. Kock's testimony
17 and documents which were submitted to the Court in support
18 of his own expenditures including printing.

19 THE COURT: I think there is ample evidence
20 from which a jury could be permitted to find in the setting
21 that the expenditures are reasonable or it might find it
22 is not reasonable, but I will leave that to the jury.

23 Motion denied.

24 MR. NEWMAN: I also move to dismiss the
25 plaintiff's complaint on the ground that he has failed to

2 set forth a prima facie case. I think we have a contract
3 which is based upon documentation. The documents consist
4 of the November 27, 1972, letter signed by Brunswick and
5 the October 12, 1972, letter appended thereto. I don't
6 think there is any disagreement but that these two form
7 the contract.

8 Now, the November 27 letter says that Brunswick
9 will utilize the score sheets furnished by Mr. Kock, but will
10 do so subject to certain specific conditions; that it will
11 live up to the legal obligations that are required of it
12 under the arrangement with Peabody.

13 The plaintiff says, no, this is not the contract
14 at all. The plaintiff says you have to use all these score
15 sheets on March 1. If you fail to use them simultaneously
16 throughout the United States, then you have breached your
17 agreement with me.

18 The documents on their face and without any
19 dispute say that our obligation is subject to a contingency
20 and that evidence that has now been established before your
21 Honor shows that that contingency was that they could not
22 all have been used simultaneously throughout the United
23 States on March 1, 1973.

24 Accordingly, your Honor, I believe the plaintiff
25 has failed to make a case and that his complaint must be

2 dismissed as a matter of law.

3 THE COURT: That is denied.

4 MR. NEWMAN: I also move to dismiss the complaint
5 on the grounds that the plaintiff failed to establish his
6 ability to perform the balance of the contract. He delivered
7 half of the plastic score sheets that were required to be
8 delivered by him. He has not shown that he had the
9 slightest ability to perform the balance of the contract
10 and deliver another half which initially cost him a sub-
11 stantial sum of money. Mr. Kock has told us that he did
12 not have the financial ability at all, that he did not have
13 the money to proceed to furnish the balance of the score
14 sheets.

15 As I point out to your Honor in our trial memoran-
16 dum, while the actual furnishing of the score sheets may be
17 excused if it is shown that Brunswick breached the contract,
18 nevertheless it is still the plaintiff's obligation to show
19 that he had the ability to perform that contract, and his
20 own testimony has shown his capacity to be in the negative.
21 He has established that he did not have the ability to
22 perform the contract. As a matter of fact, he has establish-
23 ed that he could not have done so under those circumstances.

24 Again I submit to your Honor that the complaint
25 must be dismissed.

1 cp

381A

347

2 THE COURT: That is denied.

3 Let's take five minutes and we will proceed
4 with your evidence, Mr. Newman.

5 (Recess.)

6 (Jury present.)

7 THE COURT: As you know, the plaintiff has
8 rested and now the defendant will produce such evidence as
9 it wishes. All right, Mr. Newman.

10 MR. NEWMAN: Mr. Kratzenberg.

11 * * *

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 rdh70

2 382 A

3 THE COURT: It seems to me if there is a motion
4 now I have to dismiss your counterclaims. Is that right?

5 I don't remember any suggestion of any measure of
6 damages in your evidence.

7 MR. NEWMAN: I put in no measure of damages
8 with respect to the counterclaim.

9 THE COURT: So you can't recover on your counter-
10 claim.

11 MR. NEWMAN: Your Honor has previously ruled
12 that evidence which was placed into evidence, placed in
13 by the plaintiff, which was required to be stated was
14 sufficient. I disagree with that ruling but that is
15 the ruling that your Honor made. And we do have evidence
16 of printing costs. We are asking for replacement costs for
17 3,000 plastics and 2.1 million papers. The printing
18 costs are here in evidence. I think in that sense we do
19 have some evidence.

20 I will agree, your Honor, I did not put in the
21 evidence but it was put in by the plaintiff.

22 THE COURT: I don't think it is valid for
23 the defendant at all. Did you replace them? You haven't
24 even proved that.

25 MR. NEWMAN: May I say this, your Honor: The
 reason we have not asked for damages at this point is

2 because we don't think Mr. Kock is in any way financially
3 responsible.

4 THE COURT: I don't care what your reason is.
5 You did not ask for damages, you did not prove replacement,
6 no proof of damages, certainly none that you have sustained.
7 The counterclaims are dismissed.

8 You have a rebuttal?

9 MR. BRASHICH: No. Plaintiff will rest also.

10 THE COURT: I will rule on your requests and
11 have you sum up at 2:15.

12 How long do you need for summation, Mr. Newman?

13 MR. NEWMAN: I suppose half, three-quarters of
14 an hour.

15 THE COURT: What I do with counsel, since neither
16 of you worked with me before, is give you reasonable
17 latitude but I ask you in the interests of your adversary
18 to stick to your outside estimate. So is 45 minutes
19 a good outside estimate?

20 MR. NEWMAN: Your Honor, I did not think the
21 trial would end at this point. As the old saying goes,
22 if I had time to prepare it would have been shorter. I
23 didn't have time.

24 THE COURT: I will give you each the maximum of
25 an hour, which I think is too much.

1 rdh72

2 384 A

3 MR. BRASHICH: I won't go beyond 20 minutes.

4 MR. NEWMAN: I will be quite short.

5 THE COURT: I trust it will be.

6 Let me excuse the jury.

7 2:15, will that give you enough to prepare
your summations?8 MR. NEWMAN: Could you make it 2:30? That will
9 give us time to grab a bite.10 THE COURT: I will give you that time but I
11 want you to cut that hour as a result of this time.

12 MR. NEWMAN: It won't take an hour.

13 (In open court.)

14 THE COURT: Members of the jury, both sides
15 have rested so you have heard all the evidence. That means
16 the things that remain are as follows: Counsel this
17 afternoon will sum up; that is, they will argue their
18 respective views of what you should find from this evidence,
19 and then tomorrow morning I will read you your instructions
20 which I trust won't be very lengthy but they will be
21 the rules of law that govern this case that you will apply
22 to the facts as you find them, and then you will retire
23 and with those facts and that law before you you will under-
24 take to reach a verdict.

25 So that is the schedule. In order to allow

2 counsel at least a modicum of time to draw their thoughts
3 together and repair their summations, we are going to
4 suspend a little bit early now for lunch and come back
5 a little late but it is a nice day and I am sure you will
6 be able to use the time.

7 Let us plan to reconvene promptly at 2:30.
8

9 JUROR NO. 2: Will we be able to proceed to
10 making a decision? The evidence, will we be able to
11 compare in making our decisions?

12 THE COURT: Of course. That is what you are
13 supposed to do. You will have everything before you
14 and I will tell you about it in the instructions.

15 As far as those plastic sheets are concerned
16 that you are passing around among you, I think they
17 have little or no significance at this point. They related
18 to some counterclaims which I have just --

19 MR. NEWMAN: Your Honor, they also related to
20 the affirmative defense if I may say.

21 THE COURT: I don't think there is any merit
22 to that either.

23 I am dismissing it now, I am striking it.
24 I have dismissed the counterclaims, after
25 only mild disagreement from Mr. Newman or perhaps strenuous
opposition.--

1 rdh74

386 A

2 MR. NEWMAN: May I give the reason why I didn't
3 pursue it?

4 THE COURT: You may assume Mr. Newman has
5 a 50-50 chance that he is right but I see where I am
6 and he is where he is, as he and I both agree all of us
7 are bound by the law. Whoever has the black dress
8 at any given time is in charge.

9 MR. NEWMAN: I have never demurred from that
10 at any time.

11 THE COURT: That's absolutely true. I think all
12 of you are aware we have had an orderly and civil trial.

13 Please come back at 2:30 for summations.

14 (Jury excused)

15 THE COURT: May I inquire as to the ground of
16 the dismissal of the affirmative defense relating to the
17 plastic score sheets?

18 The ground very simply is this: That on the
19 evidence as it has been placed before me I would not permit
20 a jury to find otherwise than that the plaintiff at all
21 times acknowledged the inadequacy of the plastic score
22 sheets and was at all times ready, willing and able to
23 replace them but for the alleged breach of this contract
24 by the defendant. Therefore, I would rule that if the
25 plaintiff fails on his cause, the question of the adequacy

1 rdh75

2 or inadequacy of the plastic score sheets is immaterial.
3 And if he succeeds, that an affirmative defense is
4 precluded because it was the defendant's breach which
5 prevented perfectly adequate performance and beginning
6 in March of 1973 through the replacement of those score
7 sheets with score sheets that on this record I must find
8 would surely have been adequate. So I think either way
9 the affirmative defense falls out of the case and I don't
10 want the jury diverted by messing around with this plastic
11 is thick or tinner when nobody really disagrees that the
12 plaintiff's sheets were no good but then, although Lasky
13 was perfectly ready to replace them for nothing, he had
14 no occasion on his view to replace them.

15 MR. NEWMAN: Nor did Lasky indicate he had the
16 capacity to replace them. He knew nothing about the business.

17 THE COURT: I find the evidence is overwhelming
18 on that subject, and as to knowing something about the
19 business I am not persuaded that was such a tough job.

20 In any event you asked for an indication
21 of the court's reasoning and that is an indication.

22 MR. NEWMAN: I appreciate your Honor honoring
23 my request.

24 THE COURT: I didn't know we were going to stop
25 so suddenly but let me try to adapt and it may take a little

longer than usual to rule on your requests but I think you are right that I do before you go prepare your summations. So let's go through them quickly.

Mr. Brashich, I assume that your amended requests to charge replace the originals?

MR. BRASHICH: Yes.

THE COURT: Let's just go through the amended requests.

Number 1, in the form of its submission is denied. I am not going to tell the jury that they must find for plaintiff if they find these things, but I am going to tell them that the plaintiff relies on these materials for his view that there was an agreement to start exclusively everywhere in March of 1973, and I am going to tell them in effect that it is the plaintiff's burden to prove that by a preponderance of the evidence.

Request number 2 I will grant in substance. I think that will be in the charge.

By the way, I am going to tell the jury that there is no dispute that there is some kind of agreement here. Very simply the question is what was the agreement? Was it an agreement to begin in March or an agreement to phase in, phase out. I am not going to summarize the evidence tomorrow morning because you will have summed up

1 rdh77

2 this afternoon. If I touch on the evidence it will simply
3 be to try to formulate the issues a little more clearly.

4 Request number 3 is denied and request number 4
5 I guess is granted in substance but it is only another way
6 of saying that if they agree with the plaintiff, they agree
7 with the plaintiff. So I don't think I will give those
8 words as they are put.

9 Request number 5 I believe is now out of the
10 case by the ruling, for better or worse, that the count
11 claiming the affirmative defense should be dismissed.

12 I guess the same applies to number 6, Mr. Brashich.
13 Do you agree?

14 MR. BRASHICH: Yes, your Honor.

15 THE COURT: And number 7 relates also to the
16 counterclaim which I have dismissed, so I don't think we
17 need to worry about it.

18 MR. BRASHICH: Your Honor, in light of 5, 6 and 7
19 could we have an instruction that the nonsequential numbers
20 and the defects in plastic sheets should not be considered
21 by the jury, an affirmative statement to that effect to
22 the jury in your charge, since we are throwing this out
23 in view of your ruling in dismissing the affirmative
24 defense and the counterclaim.

25 MR. NEWMAN: Would your Honor also dismiss the

1 rdh78

2 affirmative defense by not mentioning the consequential
3 exhibit?

4 THE COURT: I find there is no basis on which
5 the jury could give sequential numbers from box to box
6 and pad to pad from that phrase I heard on consecutive
7 numbers.

8 I will hear you on why you think you have
9 proved such an allegation.

10 MR. NEWMAN: It follows from the concept of
11 consecutive number. It seems silly where you need
12 consecutive numbering it stops at a given pad. What is
13 correct in consecutive numbering is that there be a con-
14 tinuation of the numbering from beginning to the end,
15 not that it stops at the end of a pad.

16 THE COURT: Then you tell him to make delivery
17 for one center for a group of centers and you have no
18 evidence that anybody at this central center broke open the
19 boxes and said, look, we must deliver to Cherry Lanes
20 sequential numbers and then to Woodhaven separate sequential
21 numbers..There is not a line of evidence that anybody in
22 your place paid the slightest attention to that when they
23 ordered him in effect to drop ship.

24 MR. NEWMAN: But the evidence is that the cartons
25 themselves as delivered to the drop shipments contained

1 rdh79

2 pads which were not in sequential order and that the
3 cartons as delivered in the centers also contained cartons
4 which were in nonsequential order. There is an exhibit in
5 evidence to that effect.

6 THE COURT: But there is no evidence that
7 anybody was told to break this down in such a way. I
8 think the evidence is so thin on that that for the jury
9 to find an obligation of that nature would be a misguided
10 determination that I would have to set aside specifically
11 if it were a special verdict. And treating it as if it
12 were, because that is the issue Mr. Brashich puts to me
13 by his motion, I will tell them to disregard that evidence.

14 MR. NEWMAN: I respectfully except, your Honor.

15 THE COURT: Now, we were up to 8. I will deny 8.
16 I don't have to tell them what is not applicable. I just
17 won't make it applicable.

18 9, I will grant 9 in substance but I will not
19 include loss of reputation and loss of opportunity. I think
20 it is too speculative. But I will allow them to assign
21 a value, if they find there is one by a preponderance of
22 the evidence, to his time. I think it is reasonable to
23 refer them to his prior salary as one possible base line,
24 so we will give that.

25 MR. NEWMAN: Your Honor, is it your intent to

1 rdh80

2 instruct the jury that the agreement commenced August 10,
3 1972, and terminated May 2nd -- that the agreement commenced
4 August 10, 1972? I am reading from that instruction.

5 THE COURT: Well, it is a dangling modifier.
6 I assume he means costs and disbursements made commencing
7 August 10th rather than an agreement made commencing
8 August 10th. But I will probably reword it in some even
9 worse fashion anyhow. All I am saying is I am granting
10 this in substance. The answer to your question is no,
11 I am not going to tell them he had an agreement that
12 began August 10th. But I will refer them to the list of
13 expenditures he claims and I am going to ask Mr. Swansiger
14 to pass out pencils and pads to the jury. They can take
15 notes on this stuff and they can take that into account.

16 Now, number 10 is denied.

17 I take it you have not agreed together on the
18 handing of the 40 or so thousands that Mr. Kock got from
19 advertisers and has not returned; is that right?

20 MR. BRASHICH: No, your Honor. We owe to the
21 advertisers. That is why I had given in 11 an alternative
22 method.

23 THE COURT: You say you owe. Are you prepared
24 to make a statement in open court right now that if you
25 recover a verdict you are bound to send back to each and

1 rdh81

2 393 A

3 every one of those advertisers the money you got from
4 them?

5 MR. KOCK: Yes.

6 THE COURT: Is that your position?

7 MR. ERASHICH: Yes, your Honor.

8 THE COURT: Will you communicate that position
9 to those advertisers?

10 MR. ERASHICH: I will, your Honor.

11 MR. NEWMAN: I believe this would be a gratuitous
12 gift or gift to the advertisers. You have had no one
13 asking for the money back. The advertisers are people
14 who check --

15 THE COURT: I understand that. I invited you to
16 enter into an indemnity agreement and you didn't do that.
17 I drafted it for you. I said make it a conditional in-
18 demnity agreement. Now I am not going to send a plaintiff
19 out of here with a verdict from which the jury deducts
20 \$40,000 and have those advertisers tomorrow say now that
21 you got the money, we want our money back. The same kind of
22 thinking that you expressed here at the bench about why
23 you are not pursuing Mr. Kock for money may have affected
24 other people who figure they can't get it anyhow. But I
25 would much prefer to leave this in a position that is
fair and equitable to both of you. If you had entered into

1 rdh82

2 indemnification arrangement, it is not for me to volunteer
3 justice to people that are not before me and I wouldn't
4 compel Mr. Brashich or Mr. Kock to go report instantly
5 to Carter Wallace that he has gotten all this money.

6 What he ought in morals and conscience to do is
7 another question but it is not before me. So here is my
8 situation: He may recover a verdict from which the jury
9 has deducted \$40,000 because he has the money and he hasn't
10 paid it back. Next week he may have to pay it all back.
11 It looks to me as though he will have to pay it back
12 if anybody sues him for it. I am not going to leave him in
13 that position.

14 On the other hand you say quite rightly why
15 should I volunteer Brunswick's money to Carter Wallace,
16 et cetera, when those people, named et cetera or Carter
17 Wallace haven't asked for it, and you have a point. But
18 the court lives in finite periods of time and I have to
19 get this case resolved when the jury comes in tomorrow.
20 The best resolution I can make in light of your unwillingness
21 to offer a conditional indemnity, is to tell Mr. Kock if
22 he represents to this jury and to me that he acknowledges
23 an obligation to pay that money back, I think as a matter
24 of law he is right and does have an obligation to pay it
25 back, he has not performed; therefore, he ought not to be

1 rdh83

2 mulcted by this jury in this case against you.

3 Nobody has explained to me why you were not
4 able to make what seems to me a perfectly sensible con-
5 ditional agreement to indemnify. Nobody has even explained
6 to me why it is not perfectly sensible.7 MR. NEWMAN: Your Honor, I think the net effect of
8 an agreement to indemnify would really be equivalent
9 to the ruling that your Honor has made; that is, that
10 we shall not let Mr. Kock be entitled to a credit. I
11 think there is going to follow, just as day follows night,
12 from the indemnity or obligation to pay.13 We also believe that Mr. Kock has really failed
14 to show that his advertisers didn't get what they were
15 bargaining for because they received a long exposure.16 To give them a gift of this nature where there
17 has been no proof made that they were damaged appeared to us
18 to be incorrect. It is for the same reason that we object
19 to your Honor's finding.20 THE COURT: If you indemnify him he has no
21 right to hand that money over to people. If you want to
22 take over defense of their claims, he will let you. If
23 you don't think they have valid claims, resist them.24 MR. NEWMAN: That was the point of contention
25 in our discussion. He didn't want to give us the right to

2 resist.

3 THE COURT: Why didn't you tell me. Of course
4 they have the right to resist. I don't understand that.5 MR. BRASHICH: The only position we made
6 is as a result of this Mr. Kock has had to leave the
7 advertising business.8 THE COURT: I don't care about emotional and
9 sentimental things. I am going farther than perhaps
10 I should. I am interested in legal things. If Brunswick
11 is going to be on the hook for \$40,000 potential liability,
12 Brunswick certainly has a right, because it knows what
13 it did with those score sheets and whether Carter Wallace's
14 name appeared in Woodhaven Lanes 40,000 times, it certainly
15 has a right to resist those claims. You can't run around
16 and give away its money and I don't understand why you
17 have resisted that. Your resistance casts a wholly new
18 light on this problem as far as I am concerned.19 MR. BRASHICH: I had suggested to Mr. Newman
20 that with the arrangement of the indemnity if there could
21 be a working out with the advertisers of their claims
22 without litigation, in which Mr. Kock would have to be
23 a witness, which would again more damage his ability to
24 get back into the advertising business.

25 THE COURT: I don't want to go any further into

1 rdh85

2 that which you suggested. It now strikes me that Brunswick's
3 position is reasonable enough.

4 THE COURT: I don't know what to do with
5 number 10 but I have told you a lot of thinking about
6 it and perhaps more than you wanted to hear and it is in
7 your hands, gentlemen. I will follow whatever lead I get
8 from what you report to me at 2:20.

9 How you can claim alternative A beats me
10 absolutely. You want the money you spent for Lasky, et
11 cetera, plus the \$40,000 you have and you are going to
12 give back. Well, you can't have it.

13 Mr. Kock, I wish you would contain yourself.
14 I don't want you to gestiulate or react to my rulings.
15 You complain to Mr. Brashich and the Bar Association but
16 I don't care for that business.

17 B, I think I will probably grant in substance
18 but this is all affected by what you do with that forty-odd
19 thousand dollars. I will know better how to handle the
20 question of damages--

21 MR. NEWMAN: Your Honor please, I was going
22 to remark the 5,000 has to do with expenditures since August.
23 It seems to me that is contingent on a finding that the
24 contract was made in August, not in November.

25 THE COURT: I have not written an opinion on

1 rdh86

2 398 A

2 the subject and I am not going to, perhaps at your
3 instance the circuit will, but my delvings into the New
4 York law of contracts indicate to me that the sums expended
5 in reasonable reliance on and imminent expectation of the
6 conclusion of this contract, in the circumstances of this
7 case, including pressure from Brunswick to get ready and
8 begin performing, my conclusion is that these sums are
9 recoverable even though their expenditure might be deemed
10 to anticipate the day of the formal making of the contract.

11 Now, I don't think I have stated that as
12 artistically as I would have liked to or as I would write
13 it out some day, but I leave it to Mr. Brashich to defend
14 it, if he can. That is the general theory on which I am
15 allowing these items.

16 I don't see any utility for either side, but
17 if anybody thinks there is utility, tell me about it,
18 I don't see any utility in bothering the jury with an
19 account of this legal theory. I am just going to tell them
20 what they may consider as recoverable items of damages.

21 Now, giving you your exception on the law, Mr.
22 Newman, let me find out do you agree that there is no point
23 in going into the statement of the legal theory?

24 MR. NEWMAN: Having given me the exception on
25 the law there is nothing more I can say. However, as to the

1 rdh87

2 amount, \$4,800 of this amount has not been paid to Lasky.
3 That is for the admittedly defective score sheets. I don't
4 see Mr. Kock has any obligation to pay that \$4,800 to
5 Lasky on the stand admitted he did a bad job. I think it
6 should be deducted from the sum.

7 THE COURT: Is that the approved cost of the
8 plastic score sheets? I don't remember that it was
9 attributable to the plastic.

10 MR. BRASHICH: The sum due and owing its cost
11 will be for shipping.

12 MR. NEWMAN: There is an invoice for shipping.

13 THE COURT: How much is that?

14 MR. NEWMAN: I thought it was 4,800.

15 THE COURT: Tell me about it late today. I think
16 you will not owe Lasky the price of the defective plastics
17 if he didn't make them good and wasn't required to make
18 them good. He even offered you. I think you ought to
19 deduct it. Give me the amount and I will simply omit,
20 if it comes out to the same thing, whatever is owed to the
21 printer. But you can set me straight on that at the end
22 of the day.

23 MR. NEWMAN: Yes, your Honor.

24 Let me go through the defendant's requests.

25 Number 1 is decided. I will let you argue that

1 rdh88

2 but I am not going to tell them in either. I am not going
3 to tell them when they must find for either side. I will
4 tell them what your argument and what the few rules of law
5 are.

6 MR. NEWMAN: If your Honor pleases, number 1
7 is the substance of the motion I made at the end of the
8 plaintiff's case, and I take similar exception to your
9 Honor's ruling on the denial of our request for an instruction

10 THE COURT: All right. Let's assume you have
11 an exception to any portions that I deny.

12 MR. NEWMAN: Thank you.

13 THE COURT: As to number 2, I will grant in
14 substance the first five and a half lines, but deny the
15 portion that begins "But only if you find both," et cetera,
16 because I don't think there is any room in this record for
17 the jury to make any different finding.

18 MR. NEWMAN: That includes ability, your Honor,
19 if you believe the plaintiff has established ability to
20 perform.

21 THE COURT: Yes.

22 MR. NEWMAN: Is your Honor ruling he has no
23 need to establish ability or he has some?

24 THE COURT: The ability to perform is so
25 overwhelmingly established by this record that any other

1 rdh89

401 A

2 finding would have to be set aside. I don't want the
3 jury to make any other finding.

4 Number 3, for reasons that we have talked
5 about, is denied.

6 Number 4 is denied for the same reasons. Number
7 5 is denied.

8 Number 6 is granted in part. I think we have
9 in effect indicated however I am granting it in the statement
10 of what I am granting with respect to the plaintiff.

11 MR. NEWMAN: I agree, your Honor. You have
12 stricken any damages for loss of reputation, loss of profits.

13 THE COURT: Yes.

14 Well, number 7 is denied. I don't think there
15 could possibly be a valid six-cent verdict in this case,
16 so I won't put that thought in the jury's mind.

17 Now, suppose we suspend until 2:20. I do hope
18 you gentlemen can reach some fair accommodation on the
19 troublesome, I agree it is troublesome, that is why it
20 has troubled me, question of that money from the advertisers.
21 But I really think that some kind of contingent arrangement,
22 which, if plaintiff wins, makes Brunswick liable for
23 repayments but leaves Brunswick free to protect its legal
24 position that no repayments are due, would be the course,
25 as nearly as I can see it, that ought to be followed. If

402A

1 | rdh90

2 you are not going to follow that, I guess, since I don't
3 have any clear precedents to go on, and I must say counsel
4 have not supplied me with any and maybe there aren't any,
5 I would just have to undertake, if it is permissible in
6 a court of law, to do justice as closely as we can approxi-
7 mate it.

8 MR. NEWMAN: In connection with the indemnity
9 is it your Honor's concept that Mr. Kock cooperate in
10 the defense of any suit by giving testimony should he be
11 called upon to do so?

12 THE COURT: Of course he would have to
13 cooperate. Again, anything is subject to a rule of
14 reason and I should think lawyers could draft some language
15 that would refer to the rule of reason. He doesn't have to
16 get out of a death bed to give a deposition. He doesn't
17 have to be nasty to his former clients but he would have
18 to cooperate and give evidence, and so on, if it is called
19 for.

20 MR. NEWMAN: And if your Honor issues with
21 whatever documents he had and discuss this matter with us
22 other than cross the witness table?

23 THE COURT: I see a real problem here. I have no
24 confidence in my proposed solution. I just don't think
25 that I am permitted to ignore it. I don't know how many

1 rdh91

403 A

2 of these two million pieces of paper were actually seen
3 by bowlers. I think it makes a difference to the amount,
4 if any, that Carter Wallace and the others may be entitled
5 to recover. I haven't enough evidence here to make an
6 absolutely certain and confident ruling on that. But
7 I repeat that I don't think it is permissible and therefore
8 I would not have thought it is permissible for either
9 of you to ignore. You haven't ignored it but I don't
10 find either solution proposed to me quite acceptable. So
11 see what you can work out.

12 See you at 2:20, gentlemen.

13
14 (Luncheon recess)

25

1 rdh 92

2 AFTERNOON SESSION

3 2:20 P.M.

4 (In open court; jury not present.)

5 THE COURT: Where do we stand?

6 MR. BRASHICH: The plaintiff will agree to the
7 concept of indemnification. The plaintiff will agree to
8 it and would request that the defendant, in our particular
9 view of things, would have the obligation and duty to
10 defend; that that particular obligation and duty would
11 expire at the end of the statute of limitations; that Mr.
12 Kock will fully cooperate with the defendant and if he
13 has to cooperate on his own time in the evenings, he will
14 do so at no charge to the defendant. If he has to go
15 and leave work, then he would request some form of com-
16 pensation for the time and any travel expenses that he
17 might have without the City of New York.

18 He will not divulge the outcome of this particular
19 lawsuit, nor will he divulge the fact that there exists
20 indemnification agreement with the defendant unless asked
21 to do so under oath.

22 The last point, he will refrain from actively
23 soliciting any lawsuits, and if asked he will only make
24 a statement of fact and not a conclusion of law, whatever
25 he has said and testified here which is a matter of public

1 rdh93

2 405 A

3 record.

4 MR. NEWMAN: Your Honor, please, in discussing
5 the indemnity with Mr. Brashich and with Mr. Koch it became
6 clear it would be impossible for Mr. Koch to live up the
7 terms of this indemnity. Essentially Mr. Koch plans to
8 go back in business, he said. He wants to deal with the
9 same people and he is going to have to come to them, says
he, and admit that he has done wrong by them.

10 Now, under those circumstances we are not talking
11 about an indemnity --

12 THE COURT: Let me interrupt. It is perfectly
13 clear to me, gentlemen, that I cannot make you agree
14 to such an indemnity arrangement, and since you have not
15 agreed we must handle the case in light of that failure
16 to agree and cope with that factor as nearly as I understand
17 it in accordance with law.

18 So let me be told now how much is involved,
19 what is the total that he received?

20 MR. BRASHICH: '\$39,760.

21 THE COURT: \$37,760?

22 MR. BRASHICH: Yes.

23 THE COURT: Mr. Newman, you are agreed on that?

24 MR. NEWMAN: Yes..

25 THE COURT: Now, I believe that the proper thing

1 rdh94

2 to tell the jury is the following: First, they should
3 consider it and may consider in their computation of damages
4 the elements of expenditure and of asserted loss for the
5 investment of Mr. Kock's time which we reviewed together, you
6 and I, this morning in my rulings on the requests.

7 Having summarized those elements of things that
8 may permissibly be considered as possible damages, I
9 will then remind the jury that in the course of his efforts
10 which finally aborted, Mr. Kock did receive some \$39,760
11 from advertisers which he has not returned to any of them.

12 I will tell the jury that if they are persuaded
13 by a preponderance of the evidence that although he has
14 not returned these sums and they have not been demanded
15 of them, he will in the future probably be required to
16 return them, then they should ignore this amount in their
17 computation of damages. But to the extent that they believe
18 that he will not be required to return this amount it
19 should be deducted from any award that is made in his
20 favor since he should not recover it twice under his
21 contract or for its breach.

22 Now I think that is basically what I mean to tell
23 the jury. I will hear any exceptions from either side.

24 Mr. Brashich?

25 MR. BRASHICH: No exceptions, your Honor.

1 rdh95

2 407 A

3 THE COURT: Mr. Newman?

4 MR. NEWMAN: I have one exception in that I
5 believe the sole evidence is that there have been no demands
6 and therefore after this period of time it is conclusive
7 that there was no obligation on the part of Mr. Kock.

8 Other than that I have no exceptions.

9 THE COURT: All right.

10 I think we have about --

11 MR. BRASHICH: We have one more minute, your Honor.
12 I believe there was discussion as to the actual sum which
13 we had arrived at, Mr. Newman and I. We had arrived at
14 a sum of \$62,264.78. The sole issue which was just brought
15 up prior to lunch was --

16 THE COURT: What is it?

17 MR. BRASHICH: \$62,264.78, which includes the
18 cost for the score sheets. If you will recall, your Honor,
19 Mr. Bersch testified that all that was needed was a bonding,
20 all that was required was a bonding to be placed on the
21 back of these particular score sheets to make them acceptable
22 so they would not return.23 The sum which is due and outstanding at this
24 present time is five thousand some-odd dollars, and there
25 is an invoice in the evidence, which result shipping
charges. That is the only thing which remains outstanding.

2 He was willing to make good the ones that were
3 destroyed up to that particular time and then recoated the
4 surface on the back.

5 There was some discussion before lunch, your Honor,
6 that there be deducted from the sum I just gave you, the
7 sum of \$4,800 which was the invoice sum paid by Mr. Kock.
8 I submit that if these particular sheets could have been
9 made acceptable by a simple coating, that the sum of
10 \$4,800 is a proper amount for damages, and Mr. Bersch testi-
11 fied that he would have coated them, the remaining ones,
12 and therefore made them acceptable and the few that were
13 already destroyed back in April, he would have replaced.

14 THE COURT: I didn't understand anything you
15 said really. Is \$4,800 a proper deduction or isn't it?

16 MR. BRASHICH: No, it isn't, sir.

17 THE COURT: What is?

18 MR. BRASHICH: The sum for perhaps 200 or 300--

19 THE COURT: Where do I find that in the record?

20 MR. BRASHICH: It is not in the record.

21 THE COURT: What are we going to do, sit here and
22 speculate what rebonding costs? It is for you to prove your
23 damages. You delivered, admittedly unsatisfactory plastic
24 score sheets. There was a price for them. That is all the
25 record shows. The defendant does not have to take

1 rdh97

2 unsatisfactory score sheets and you don't have to pay for
3 unsatisfactory score sheets. Therefore, whatever it is
4 you owe for whatever to Mr. Lasky, you can deduct the
5 price of the score sheets, it seems to me on this record,
6 plastic score sheets, and that's what we ought to do.

7 Frankly, gentlemen, I would, reserving to both
8 of you any exceptions you have to details of the proposed
9 charge, I would think it is much simpler and orderly for
10 the jury to wind up with an agreed figure rather than have
11 all these additions and subtractions for the various things.

12 Now, he owes five thousand something and the plastic
13 score sheets cost 4,800; is that what you say?

14 MR. BRASHICH: Yes.

15 THE COURT: I would like to get the net of that
16 and add it on to this 62,264.78 --

17 MR. NEWMAN: It's already included. It would have
18 to be deducted.

19 THE COURT: So you have agreed on the figure of 62?

20 MR. BRASHICH: Yes, your Honor.

21 THE COURT: Why don't I deduct 4,800 and see if
22 our arithmetic comes out the same.

23 I get \$57,464.78 as the resulting total of his
24 expenditures. And if I could get your agreement to that I
25 would just include it in my instructions.

2 MR. BRASHICH: \$57,464.27?

3 THE COURT: 78 cents.

4 MR. NEWMAN: The arithmetic I have done comes
5 out the same way, your Honor.

6 THE COURT: Is it fair to both of you or unfair
7 to one of you if I just say these expenditures you have
8 heard about come to this total? Any of them that you find not
9 proved or not reasonable you should eliminate. But to the
10 extent that you find them proved and reasonable under the
11 circumstances you may include them in your computation of
12 damages. Is that agreeable to both sides?

13 MR. BRASHICH: That is agreeable to the plaintiff.

14 MR. NEWMAN: That is, your Honor.

15 THE COURT: That leaves to you full scope for
16 whatever argument you want to make on them on that subject.

17 Are the jurors back?

18 THE CLERK: Yes, your Honor.

19 MR. NEWMAN: If your Honor please, there was
20 one exhibit introduced by plaintiff, 73, which he under
21 took to mask in part. I observe it has not been masked.

22 THE COURT: Will you do that right now?

23 MR. BRASHICH: Yes.

24 THE COURT: Give me one minute and I will rejoin
25 you and we will go on to summations.

* * *

rdh 1

WINSTON E. KOCK, JR.
v.
THE BRUNSWICK CORP.

October 11, 1974.
10:15 A.M.

(Jury not present)

THE COURT: Are we all ready?

MR. BRASHICH: Yes, your Honor.

MR. NEWMAN: Yes, your Honor.

(Jury present)

THE COURT: Good morning, ladies and gentlemen.

We have now reached the stage which is the critical stage
in this case, the time when it will be given to you for
your judgment. As we have all told you more than once during
this week the point and the problem of a trial is the
determination of disputes about facts and you are the
sovereign judges of the facts.

I will remind you that when we use those words,
though they sound very important, the sound is meant to
reflect that they are important and that you are sovereign.
The things that the lawyers may say, that I may say
about our views of the facts, if you detect any, have no
significance at this point. It is your views of the facts,
the inferences to be drawn, the ultimate determinations to be

1 rdh 2

2 made that will govern this case.

3 You will find the facts, I remind you, from
4 evidence, and evidence is the testimony you have heard
5 from the witness stand, the exhibits, which are numerous
6 as they usually are in a case of this kind, and a couple of
7 things that are stipulated. depositions will also be included
8 among the materials from which you will make your determina-
9 tions about where the truth lies insofar as there have been,
10 and there have been, controversies as to what actually
11 happened, what was actually said, what was actually under-
12 stood at the times in question.

13 As this case comes before you for decision it is
14 not disputed that there was an agreement of some kind
15 between Mr. Kock, the plaintiff, and Brunswick, the defendant,
16 for his supplying of plastic and paper score sheets
17 to be used in the Brunswick Bowling Centers.

18 The deal basically was that Mr. Kock would
19 supply those score sheets, that they would be used by
20 Brunswick, by Brunswick bowlers; that Brunswick would incur
21 no expense for them; that Mr. Kock would obtain and supply
22 them and earn his profit from the receipts he got from ad-
23 vertisers whose literature appear on those sheets. That much
24 I think, subject always to your sovereign views about what
25 you think, that much I think may fairly be said to be

1 rdh 3

2 undisputed.

3 The dispute arises with respect to the question
4 when and how Mr. Kock's score sheets were to become the
5 materials of this nature to be used in those bowling
6 centers, and specifically the dispute is created by Mr.
7 Kock's contention that from and after March of 1973,
8 for at least a year, his score sheets were to be used
9 exclusively in all of the Brunswick Bowling Centers, or
10 to put it somewhat differently in terms of the problem,
11 that by March of 1973 it was understood and he was entitled
12 to understand that Peabody will be out and he would be
13 in as the supplier of those score sheets.

14 As against that, as you know, the defendant
15 contends that Peabody, having staggered dates of advertisement
16 and entry into the various bowling centers would have to
17 be phased out and that Mr. Kock would correspondingly have
18 to be phased in, and that this was understood by both sides
19 and that it was understood that the phasing in of Mr. Kock
20 would extend through 1973 and evidently into at least
21 a month or two of 1974.

22 The plaintiff claims that the breach consists
23 of the failure and refusal to have him serve exclusively
24 as the score sheets supplier in all the centers from and
25 after March of 1973.

1 rdh 4

2 The defendant, as I have said, replies that there
3 was no such agreement; that plaintiff knew or should have
4 known that Peabody would remain in a number of the centers
5 while being phased out on through 1973 and into 1974.

6 The plaintiff claims that this theory of phasing
7 out and phasing in after March of 1973 was an afterthought
8 and not part of the agreement or understanding and that it
9 resulted basically from the insistence of Peabody resulting
10 in Peabody's lawsuit and a settlement of that lawsuit
11 by Brunswick in which plaintiff says, and apparently it is
12 the case, he had no participation. Plaintiff has relied on
13 a number of things that I won't enumerate or repeat. They
14 include the apologies expressed by Brunswick personnel
15 after the settlement of that Peabody lawsuit.

16 The defendant, too, relies on a number of things,
17 citing conversations and memoranda that are said to
18 show the awareness by the plaintiff as well as defendant's
19 people of the ongoing rights of Peabody and Brunswick's
20 ongoing obligations corresponding to those rights.

21 Now, when I mention the claims and the responses
22 and when I mention some of the things that each side relies
23 upon, please have in mind that I do this only for purposes
24 of illustration and to try, as well as I can, to formulate
25 the issue for you with a reasonable measure of clarity; that

1 rdh5

2 is to say, I am not going to summarize the evidence, I
3 am not going to summarize the arguments and materials and
4 the claims on one side or the other. That was done for
5 you yesterday afternoon. And you may believe, because it is
6 correct, that I don't have any view whatever on how you
7 are to decide the issues thus placed before you.

8 So understand in short that these illustrative
9 things that I tell you about evidence on one side or the
10 other are simply that. They are illustrative things. If
11 I mention two things for one side and one thing from the
12 other side, don't draw any inferences because you will be
13 mistaken. The illustrations may not always balance out
14 as if they were done on jewelers' scales, but they are meant
15 simply to draw the issues for you and to leave to you the
16 problem of remembering all the evidence and lining up
17 all the evidence on both sides before you make your judgment
18 as to where the right and truth of this case are to be found.

19 Now, the plaintiff brings this lawsuit and presents
20 the claim for recovery. In our system, and in this respect
21 I guess our system resembles most legal systems though it
22 does not in other respects, the claimant undertakes, is
23 charged with the burden of proof, and you have heard that
24 expression, burden of proof, but let me say a few words
25 about its meaning in the setting of this civil lawsuit. When

1 rdh6

2 we say in such a civil case the party has the burden of
3 proof, we mean that he must, if he is to succeed, prove
4 his contentions by a fair preponderance of the evidence.
5 Now that phrase, a fair preponderance of the evidence,
6 simply refers to the greater weight of what the triers
7 of fact, you ladies and gentlemen of the jury here, find
8 to be the credible evidence in the case.

9 When we speak of weight, we don't mean bulk
10 or heft or anything physically, we mean the persuasive
11 impact of the evidence on the mind or minds of the triers
12 of fact. And the party with the burden of proof, in a few
13 words, must, if he is to succeed, prove that his versions
14 or version of the facts is more probable than the opposite
15 or contrary version taken by his opponent.

16 In assessing the question, then, whether the
17 plaintiff has sustained his burden of proof, your task
18 will be to weigh, in the sense that I have described, what
19 you find to be the credible and convincing evidence on both
20 sides. If after that you find that the scales, and it is
21 a figure of speech but I trust it is meaningful at this point;
22 if after you have weighed the evidence you find that the
23 scales tip in favor of the defendant or if you find that
24 they are evenly balanced in your minds so that you can't
25 make up your mind about a material issue of fact, then you

1 rdh7

2 must find that the plaintiff has not borne his burden of
3 proof and you must find for the defendant.

4 On the other hand, when we talk about proof by
5 a fair preponderance of the evidence, we don't mean proof
6 beyond any doubt and we don't mean proof even beyond a
7 reasonable doubt, which is the relevant expression in
8 a criminal case, not a civil case, we mean simply that
9 the plaintiff must show greater probability for his version,
10 and so in that scale figure of speech if you find that
11 the scale tips in the direction of the plaintiff, in favor
12 of the plaintiff, however slightly, then you may find that
13 he has, with respect to the particular issue, succeeded
14 in sustaining his burden of proof.

15 Now, this is a contract case. It is governed
16 by the law of contracts. I don't know how much it interests
17 you, but it is actually governed by the New York law of
18 contracts, New York State law. It is a case that gets into
19 the federal court under a jurisdictional principle called
20 diversity of citizenship. People of different states, if
21 their cases are alleged to involve over a certain amount
22 of money, may sue in the federal courts under the diversity
23 of citizenship jurisdiction. Then the federal court sits in
24 effect, sits as if it were a court of the state and apply
25 state law. So I must in instructing you, follow the law of

1 rdh8

2 New York State and you, of course, apart from the fact
3 that you are all citizens of New York State, must follow
4 those rules of law as I give them to you. And I might
5 say that they are not very complicated and the rules them-
6 selves are not especially the subject of much dispute
7 between the parties or their counsel.

8 Very simply you should understand that under
9 the law of contracts, as it will apply in this case, a
10 contract may consist of written statements, oral statements,
11 nonverbal conduct that has the effect of communicating
12 understandings, or some combination of all three kinds of
13 things, written and oral statements and conduct. .

14 To put it otherwise, a contract does not have
15 to consist of a single document or a single conversation
16 or a single instance of behavior. And you know by this
17 time, having heard the arguments and having received
18 the evidence, that the plaintiff relies perhaps on all three
19 kinds of evidence, but essentially on written and oral
20 communications during the lattermost or latter half of 1972
21 and on into early 1973.

22 As it develops, though the emphasis of the parties
23 differs, you have also heard that the defendant refers to
24 and relies upon many of the same communications, written
25 and oral, probably as is common, stressing different parts,

1 rdh9

2 stressing different views as to meaning, and in some cases,
3 of course, especially where we deal with conversations,
4 stressing different versions of those conversations, and
5 at least a couple of instances your decision as to which
6 is the correct and credible version is likely to make
7 a significant difference in your judgment as to where
8 the truth lies and then ultimately your judgment as to who
9 should prevail in the lawsuit.

10 Now, again, just to jog your thoughts before
11 you go to the jury room and just for illustrative purposes,
12 let me remind you of some of the materials that have been
13 invoked after being placed in evidence by one or both
14 sides as supporting their views of what the agreement
15 should be understood to have been. The plaintiff, and I
16 have listed some of these and I repeat this may not be
17 and probably is not exhaustive or evenly balanced, but please
18 understand what it is for. The plaintiff among other things
19 has referred you to his telegram of August 10, 1972, which
20 he described, if I recall, as committing him to Brunswick, and
21 a letter a couple of days later, those being Exhibits 56
22 and 55 respectively. He has relied, among other things,,
23 among the writings, on his letter to Mr. Kratzenberg of
24 October 12th, which I have noted is Exhibit 13. He has
25 placed central reliance on the letter of November 27, 1972,

1 rdh10

2 from the defendant to himself, which I think is Exhibit 16,
3 and to some extent a letter of the same date from the
4 defendant to Peabody, of which the plaintiff was shown a
5 copy, which I think is Exhibit 15. Then without extending
6 that enumeration, the plaintiff has relied, as you know,
7 on an array of other papers, writings, communications
8 which you will be considering along with all the evidence
9 in appraising the issues before you.

10 Now, as I have said, the defendant stresses
11 many of the very same documents and the same conversations.
12 I think the defendant has placed some emphasis on a hand-
13 written note the plaintiff wrote on June 9th, I think on
14 yellow sheets of paper which is in evidence as Exhibit 4.
15 The defendant has stressed from the defendant's own letter
16 to Carter Wallace referring to the 1973 bowling season
17 as the period of Mr. Kock's role as score sheet supplier,
18 and that I think is Exhibit 83. The defendant has placed
19 some special emphasis on that November 27th letter from
20 itself to Peabody, and now I am not sure which is Exhibit
21 16 and which is 15, but the two November 27th letters are
22 Exhibits 15 and 16 and I do not think it will impair the
23 course of justice, if as I now believe, I gave them to you
24 backwards. You will have them both and you can look at them.
25 The letter to Peabody being either 15 or 16, is the one that

1 rdhll

2 the plaintiff said it was a flat termination of Peabody
3 and the one that defendant, especially through the testimony
4 of Mr. Kratzenberg, says was designed to draw out Peabody
5 and thus elicit precise information as to the termination
6 dates.

7 Defendant has also relied, as you know, on various
8 communications to and from Peabody which are, of course,
9 an important source of the problem in this case, and finally
10 the defendant, I believe, has stressed the November 27th
11 letter from itself to the plaintiff as being essentially
12 the agreement, and the defendant has emphasized a reference
13 in that letter to Brunswick's obligations to Peabody which
14 Brunswick asserted would be fulfilled.

15 Those are illustrative things and they remind
16 you, and that's all I mean to do at this stage is remind
17 you of the key issue: What was the agreement or under-
18 standing? Was it an agreement that Kock would be exclusive
19 in all the Brunswick centers beginning in March, 1973, or
20 was it the kind of phasing in-phasing out agreement the
21 defendant has urged you to find?

22 Now, in deciding what kind of agreement it was
23 you to apply what legal people would call, not altogether
24 without good sense, an objective test. What do I mean by
25 that? I mean very simply that in deciding whether people hav

1 rdh12

2 contracts, and whether there was an agreement, there was
3 a contract; then in deciding what the contract was, you use
4 an objective test in the sense that one party's private
5 beliefs or understandings or hopes or expectations, if they
6 were not communicated to and agreed upon by the other party
7 can't constitute part of the definition of agreement.
8 We don't have that kind of subjective test for a contract,
9 because a contract is a matter of mutual engagement, mutual
10 promise normally, and mutual understanding. So in that
11 sense you use an objective test. And, therefore, it will
12 be your task in defining this agreement to reconstruct
13 this evidence, examine the writings, examine what you find
14 to have been the oral statements, and then decide whether
15 these people in fact understood the contract to be what
16 one side says rather than the other; or, in objective
17 terms, whether as reasonable people exchanging such com-
18 munications they should have understood that the contract
19 meant one thing or another. You will not eventually be able
20 to look into the heart or soul of anybody. You have to
21 decide what they in fact understood objectively in a sense
22 of what they should have understood and should have under-
23 stand themselves to based on the communications they ex-
24 changed with each other. And it is in that sense that
25 I say you will apply an objective test in determining

1 rdhl3

2 what the agreement was between these parties.

3 Now, if you find that the agreement was the
4 version the plaintiff has placed before you, then you may
5 find from the evidence of what happened that the defendant
6 breached this contract and is, for that reason, liable
7 to the plaintiff.

8 If, on the other hand, you find that the agreement
9 was as defendant has defined it for you, then you may find
10 that the defendant did not breach the contract and that
11 the plaintiff is not entitled to any recovery at all.

12 If you find that the defendant is liable,
13 then you have decided in plaintiff's favor the question of
14 liability, as we call it, you reach the question of damages.
15 You only reach the question of damages if you find liability.
16 But the damages, like most other things, is governed by
17 rules of law, and they are complicated and so I have to
18 give you those rules of law.

19 You will understand the fact I give them to you
20 doesn't mean that I am telling you you must or will find
21 the defendant liable. I am giving you these rules to apply
22 if and when you have determined that there is liability
23 and have thus reached a question of what amount of damages
24 you should award.

25 Now, on damages, as on the other elements of this

1 rdhl4

2 claim, the plaintiff has the burden of proof and he has
3 undertaken to sustain it. Damages, like the earlier subject,
4 is not terribly complicated but let me lay it out for you.
5 Basically subject to a possible alleged deduction that
6 I will talk about in a few minutes, the damages the plaintiff
7 may claim in this case consists of two elements: First,
8 if there was an alleged breach, thus his expected income
9 was to take a different form and have a different basis,
10 if there was a breach the plaintiff may now claim from
11 this defendant his out-of-pocket expenses for the period
12 from August 10, 1972, to May 2, 1973. The legal reasons
13 for that are not terribly interesting but we have discussed
14 them and it is efficient for your purpose to know that that's
15 the period under the law of the case, as I have determined
16 it, for which the plaintiff may claim out-of-pocket
17 expenses.

18 As the second element of what he may claim the plaintiff
19 is entitled to recover for the investment of his time,
20 his energy and his talents, devoted to this score sheet
21 enterprise during that same period of about ten months
22 or so, August 10, 1972, to May 2, 1973.

23 Now, as to the out-of-pocket expenses, the first
24 of those two elements, you will recall that the plaintiff
25 has made claim and offer of proof for a variety of items,

1 rdhl5

2 the largest of these is, of course, the claim for printing
3 costs, the amounts paid to the printer Lasky.

4 In addition the plaintiff has put in claims for
5 travel, entertainment, automobile, telephone and other
6 things. Before he may recover for these things the plaintiff
7 must prove that he did in fact incur these expenses and
8 that they were reasonable in all the circumstances. To the
9 extent that you find these things established, actual
10 expenditure and reasonableness, you may make an award
11 for these expenses.

12 Now, as to that further, counsel yesterday,
13 helpfully, agreed that the total of those various items,
14 the printer, the automobile, the telephone, et cetera,
15 may be taken by you to be the sum of \$57,464.78. I will
16 mention to you that that agreed sum of \$57,464.78 represents
17 the resolution of a problem that you can now bypass and
18 not worry about. Specifically, that there had been a charge
19 by Lasky of some 4,000 or so dollars for those plastic
20 score sheets. It was agreed by everybody that the plastic
21 score sheets were imperfect and defective and although
22 it appeared that Lasky would have replaced them, the
23 plaintiff wasn't required in the circumstances to take
24 the replacements and the defendant should not be required
25 to pay for them. So from the total that you would get if

1 rdhl6

2 you went through all those papers, according to the
3 able arithmetic of these able attorneys, there was deducted
4 some \$4,000 and that 57,000 plus figure that I gave you
5 is a net figure after that deduction.

6 Now, what does that mean? Very simply as to
7 out-of-pocket expenses, if you find that the plaintiff
8 has proved all the items he claimed, proved that he expended
9 them and that they were reasonable, you may give him that
10 agreed total of 57,464.78. Insofar as you find any of those
11 items were not paid or were unreasonable, then to that
12 extent you must deduct from that total when you are de-
13 termining the amount of damages for out-of-pocket expenses.

14 I think that takes care of that.

15 By the way, the reference to those plastic
16 score sheets leads me, incidentally, to mention something
17 just to tell you to forget about it. As the case comes before
18 you, as a result of rulings and discussions, the evidence
19 about the condition of the plastic score sheets is no longer
20 of any interest to you. The evidence about the problem
21 of sequential numbering is also of no interest to you.
22 So those things you may put to one side and disregard
23 in determining what things you must worry about and what
24 things are not important.

25 I told you in addition to the out-of-pocket

1 rdhl7

2 expenses Mr. Kock claims, and is entitled to claim, as the
3 second amount of damages the amount for the energies, his
4 time and talents in an effort to prepare this contract,
5 always assuming there was a breach for which the defendant
6 was liable. In making that determination as to the amount
7 for time and talent, you are called upon to exercise
8 a seasoned and common sensical and reasonably sophisticated
9 judgment. You have seen the plaintiff, you have learned
10 something about him, his background, his abilities.
11 You must, you should, you will take those things into
12 account in appraising this second element of damages. You
13 have heard that at a point reasonably close to the time
14 that he went into his own enterprise he had been working
15 in the advertising business and that his salary had been
16 some \$22,000 a year. You may consider that as a factor
17 to take into account in estimating what you judge to be
18 the worth of his time and his creative efforts for this
19 score sheets enterprise. That number I give you, I repeat,
20 is only a factor. We all have a tendency to latch on to
21 numbers because they are solid and real and definitive.
22 I think you will not wish to follow it mechanically or
23 slavishly but to take it into account as one of the things
24 you will consider among all the circumstances in deciding
25 what award you should make, if you are making an award of

1 rdhl8

2 damages, for this element that I have called the second
3 element, the compensation for time and effort and so on.

4 Now, I told you I would speak to you about an
5 issue relating to a deduction or possible deduction from
6 the award of damages. Now, you will at this point, according
7 to the logic of these instructions, if you reach this point,
8 you will have added up the first two items of expenses
9 and time and effort and you will have some total presumably.
10 Then the question is whether you should deduct for this
11 item of arguable deduction that I am now going to tell you
12 about. You will remember under the evidence that about 18
13 months ago, in March of 1973, Mr. Kock received a total,
14 which again counsel have agreed upon, of \$39,760 from four
15 of the advertisers whose literature was to appear and did
16 appear on the score sheets he produced for use by Brunswick.

17 Now, you have learned that Mr. Kock has retained
18 this total of \$39,760; that he has not repaid any of it
19 and that none of the advertisers who paid these sums have
20 requested or demanded their return.

21 Now, here you must consider the evidence and
22 consider what you decide about it respecting the status
23 of these receipts in deciding whether some part or all
24 of that 39-odd thousand dollars must be deducted from
25 the damage award. On the one hand, you may find from the

1 rdh19

2 evidence, and this, of course, is one of the things that
3 is for you to find one way or the other, that although the
4 score sheets did not go in exclusively and everywhere in
5 March of 1973, the score sheets were used by Brunswick,
6 that the advertisers' messages were exposed over these 18
7 months to the bowlers, and that they have had some or all
8 of the benefit for which they paid Mr. Kock.

9 In that event you may conclude that the ad-
10 vertisers have no right to get their money back and
11 Mr. Kock has no obligation to give it back to them.

12 On the other hand, you may find that the ad-
13 vertisers did not get what they paid for, did not get
14 the exposure in the time and in the way that they were
15 given to understand they would get it, and that the plaintiff
16 is under an obligation to repay part or all of that
17 39-odd thousand dollars.

18 Now, I remind you, of course, on this subject, as
19 on the other, the burden of proof is on the plaintiff. I
20 instruct you as follows: If you find that the plaintiff
21 has not repaid the money, and of course that is undisputed,
22 but if you further find that he is not obliged or expected
23 or required to pay it in the future, having kept it until
24 this time, then to the extent of any such finding you must
25 deduct that 39-odd thousand dollars or the part of it you

1 rdh20

2 believe is subject to your finding from the total award
3 of damages. Otherwise, as you will understand, Mr. Kock
4 would be getting compensated twice to make up for his
5 expenditures.

6 On the other hand, if you find from a pre-
7 ponderance of the evidence that the plaintiff did not deliver
8 to the advertisers what they were entitled to expect and
9 that he is under an obligation to make repayment, whether
10 or not it has been demanded thus far, then you should not
11 deduct for that total sum or for such part of it as you
12 find the plaintiff, Mr. Kock, is still obliged to make
13 repayment.

14 I hope that is all clear to you and I just
15 instruct you that you must use that question of possible
16 deduction in the way that I have undertaken to outline
17 for you.

18 Now, it is standard instructions to juries,
19 and we always follow habits and precedents in the courtroom,
20 to talk a little bit about credibility, and I will talk
21 to you a little about it now. You have listened to wit-
22 nesses, and you know, as I mentioned before as you knew
23 before I mentioned it, that there are conflicts in the
24 testimony that you have heard. Some of the conflicts
25 are important. Perhaps most notably some of the conflicts

1 rdh21

2 between Mr. Kock and Mr. Kratzenberg as to what went on
3 between them orally, verbally at certain times and places.
4 Such conflicts in testimony present questions of credibility
5 for your sovereign judgment as the triers of fact. Though
6 we talk in jury instructions about credibility, it is not
7 a technical legal subject. The premise of our system is that
8 lawyers and judges are not particularly better qualified
9 to decide credibility than anybody else, and so we bring
10 lay people like you, people who are laymen in the sense
11 that you are not legally trained, to the courthouse and
12 expect that you, applying your common sense and your
13 collective wisdom and your experience of how people behave,
14 will faithfully and effectively decide questions of credi-
15 bility. You have heard these witnesses in this relatively
16 short trial. You will want to size them up. How did they
17 testify, how did they look, how did they compare on direct
18 examination with their cross examination? Did they seem
19 to know what they were talking about? Did they seem to you
20 to want to tell you truthfully what they knew? What
21 interest does one party or another have in the outcome
22 of the case? Does that interest affect the testimony?

23 Obviously the fact that somebody is interested
24 doesn't mean that he is not truthful. If that were the
25 case we simply wouldn't allow interested people to testify.

1 rdh22

547

2 But the interest of a person and the outcome may be a
3 factor, among other factors, bearing on the extent to
4 which you will credit his or her testimony, and I have
5 simply, again, in the way of illustration and reminder,
6 mentioned a few factors. Others will occur to you. You
7 will consider everything that your judgment and your good
8 sense and experience counsel you to consider in deciding
9 questions of credibility.

10 When you are doing that, ladies and gentlemen,
11 there will, when you go to the jury room, be six of you,
12 and you will understand the purpose of that. It is the
13 purpose and expectation that you will reason together
14 in attempting to reach a just decision in this case. That
15 means that each of you is entitled, certainly, and indeed
16 expected, to contribute your own wisdom and your own point
17 of view to those deliberations. It also means by the same
18 token that each of you will go there prepared to listen
19 attentively and courteously to the views of your fellow
20 jurors. If you have a point of view and during discussion you
21 are rationally persuaded that you were wrong, obviously
22 you won't hesitate to change your mind in the interests
23 of the collective concern for right and for justice.

24 On the other hand, if you have a point of
25 view and in conscience and in your judgment it stays correct,

1 rdh23

2 you are not required to change it because at some particular
3 moment you are in the minority. I think you know that
4 in order to reach a verdict, you must be unanimous. But
5 the unanimous verdict of a jury is to represent the judgment
6 of each of you after you have reasoned and deliberated
7 together.

8 As to the form and the style of verdicts in
9 this court we deliver them orally. Your forelady will deliver
10 the verdict orally in the courtroom when you are ready to
11 give one. The form of the verdict will be very simply either
12 a verdict for the defendant or a verdict for the plaintiff
13 in some stated amount of money.

14 I think I mentioned, but in any event let me
15 repeat, and I think Mr. Maurer asked a question about this
16 yesterday, when you go to the jury room in a case like
17 this it seems convenient to have the exhibits with you
18 and Mr. Swansiger will have them assembled for you and
19 brought to the jury room with you. Obviously you will want
20 to try to keep them as orderly and as neat as possible.
21 Some day somebody may want to look at what we have done
22 here and they may need them. But you may study them for
23 your purposes.

24 If you should want any further information
25 in the nature of repetition of these instructions or if you

2 think you need to hear some testimony again, send us
3 a note through your forelady and we will find and undertake
4 to give you whatever you need.

5 By the way, if you send out notes and at the
6 point of sending them you happen to be divided in your vote
7 on something, which happens with juries, don't tell us the
8 division, don't tell us how the vote stands. That is private
9 jury business and not a concern of ours.

10 I think I am about through but let me see whether
11 counsel have any exceptions or additions that they wish
12 me to present?

13 Do you want to come up, gentlemen
14 (Pause)

15 While we are waiting for counsel let me say
16 that our original six jurors appear to have remained healthy
17 and alert and so it becomes my function to say earnestly
18 that we thank our alternate jurors but at the point of
19 retirement under our rules we have only six and not eight.
20 So Mr. Hershof, Mr. Morelli, we do thank you and you are
21 now excused. I understand your term of service is completed
22 and so we bid you good morning and wish you well.

23 (Alternate jurors excused)

24 MR. BRASHICH: I have no exceptions to your
25 Honor's charge. The only request we would have is I believe

1 rdh25

2 your Honor stated that in the sum of \$75,000 to find out
3 whether it was reasonable and whether these sums were paid.
4 I was wondering whether we could elicit a clarification
5 that in that \$57,000 there is a sum that he owes to the
6 printer, which is the \$5,000 which he testified to.

7 THE COURT: But that's what I have deducted.

8 MR. BRASHICH: You have deducted the \$4,800.

9 THE COURT: So it washes out to a thousand dollars
10 or something.

11 MR. BRASHICH: I am saying if they find in
12 Exhibit 65, I believe, that he has not paid \$5,000 to the
13 printer they might deduct the 5,000 from the 57..

14 THE COURT: I think that I will just say that.

15 MR. NEWMAN: I have no objection to that.

16 Your Honor, on the question of deductions I
17 think you incorrectly stressed that the obligation of Mr.
18 Kock to return the money was the key factor. I think the
19 jury has to take into consideration the likelihood that he
20 will be called upon to return the money to the advertisers.
21 In that connection we don't have the advertisers here making
22 a claim. In that connection we don't know, we haven't heard
23 from them and it would be mere speculation to say that
24 they did or didn't get their money's worth. I think what the
25 jury should take into consideration on such things is

1 rdt26

2 likelihood, not such things as what might be determined
3 as an absolute moral obligation.

4 THE COURT: I didn't say moral.

5 MR. NEWMAN: You said obligation. I think likelihood
6 of return should be emphasized, taken into consideration,
7 the period of time that has elapsed since payment.

8 MR. BRASHICH: In that light if I can ask that
9 we can put that charge together that he still has not paid
10 the printer and no demand has been made, but it is an item
11 of damages which may be viewed by the jury. Perhaps we
12 can put those two things together.

13 MR. NEWMAN: On the same question of repayment
14 to advertisers I think the jury should be instructed
15 as well to take into consideration whether the necessity
16 to repay advertisers in the sums would arise from the
17 defective plastic score sheets. If they do arise from the
18 defective plastic score sheets, then they should not be
19 deducted because that was no fault of the defendant.

20 THE COURT: No, it was a default of the defendant
21 if they find the defendant liable because he would have
22 replaced those. That gets us into such a thicket of
23 business. Maybe you ought to pay back the advertisers
24 because if the score sheets had been replaced and you had
25 invited them to do that, then the advertisers would have

1 rdh27

437 A

2 come closer to getting what they bargained for rather than
3 having all this bubbly running ink, and so on. I don't
4 want to get into that and I won't.

5 MR. NEWMAN: I respectfully except and you know
6 it is respectfully.

7 THE COURT: Anything else?

8 MR. NEWMAN: No.

9 (In open court)

10 THE COURT: Based on our conversations and
11 suggestions of counsel let me add a couple of words. As
12 to the agreed sum of 57-odd thousand dollars of expenditures,
13 as I call them, there is a small complexity. Some \$5,000
14 of that is a sum owed to the printer Lasky, and that was
15 included by counsel in their agreement in totaling up these
16 expenditures because it is apparently agreed to be an
17 obligation.

18 Then in turn I told you counsel deducted \$4,000
19 for those plastic sheets that were imperfect. Just have
20 that in mind and understand that it was agreed that these
21 computations could properly be made in that way. So if
22 you find it useful, though I have trouble figuring out
23 why you would find it useful, to go through and check the
24 lawyers' addition, you will have this in mind.

25 Now, again on the subject of obligation, in talking

1 rdh28

2 to you about the question of a possible deduction from
3 the award for damages because of those payments Mr. Kock
4 received from advertisers, I told you that if you are
5 persuaded by the plaintiff that he has an obligation
6 to make repayment, then to the extent of that obligation
7 you should make no deduction.

8 Now, the suggestion has been made, and I do convey
9 it to you, that in appraising that amount of obligation,
10 you should take into account both obligation and likelihood
11 of repayment; that is, an obligation existing and avoid
12 which one is not required to fulfill and does not intend
13 to fulfill is not a meaningful obligation for this kind
14 of purpose. So in deciding whether you should refrain from
15 deducting, remember that in order to avoid any deduction,
16 you must be persuaded by a preponderance, that is that the
17 scale tips to the plaintiff, that he has an obligation
18 to make the repayment and that he will be likely to be
19 called upon to make the repayment or that he would be
20 likely voluntarily to make the repayment if you find he
21 has such an obligation.

22 I don't think that needs to be pursued much
23 further, but I will tell you that the obligation, if it
24 exists, is a contractual obligation. The advertisers
25 presumably would be getting repaid because of a breach of

1 rdh29

2 their contract with Mr. Kock, and I believe under the law
3 of New York which we are applying here, the statute of
4 limitations, a period in which a contract claim must be
5 made, is six years, gentlemen?

6 MR. BRASHICH: That's correct, your Honor.

7 MR. NEWMAN: That is my understanding.

8 THE COURT: You can have that among the other
9 things you consider in connection with this subject.

10 Now, I believe, if the marshal may be sworn,
11 the jury may retire.

12 (Marshal sworn)

13 (Jury retires at 11:05 A.M. to deliberate upon
14 a verdict.)

15

16

17

18

19

20

21

22

23

24

25

1 rdh30

2 THE COURT: Gentlemen, while we are standing
3 by let me just for your guidance tell you the practice
4 Mr. Swansiger and I follow. If there are notes from this
5 jury he will, in the normal course, call me up and read
6 them to me, and then while I'm seeing if the elevators
7 are working he will normally show them to you so that you
8 can let me know what to do about them. Sooner or later
9 we also show them to you. When I say normally, sometimes
10 because of the nature of a particular note I delay having
11 shown it to you until I get here but usually you will
12 have seen it by the time I arrive. Otherwise, I guess,
13 we will just stand by and wait.

14 (Discussion off the record.)

15 THE COURT: Mr. Swansiger, who is expert in
16 this subject, raises the question of lunch with me and
17 I suggest, if nobody has any different view, that we ask
18 the marshal to take the jurors out at 1 o'clock and we
19 will assume that we are all released for an hour and 15
20 minutes or so at that point.

21 Is that agreeable?

22 MR. NEWMAN: Agreeable.

23 MR. BRASHICH: For the plaintiff, your Honor.

24 THE COURT: All right, gentlemen.

25 (Recess)

1 || rdb31

2 (Jury note at 4 P.M.)

3 (In open court, jury not present.)

4 THE COURT: All right, you have the note. You
5 have seen it, gentlemen, which is Court Exhibit No. 2, and
6 id asks for testimony covering this clarification, please.

I understand you are not quite in agreement on
how we ought to respond to the note.

9 Mr. Brashich.

10 MR. BRASHICH: With your leave, your Honor, that
11 note to me could mean either the November 27th conversation
12 between Mr. Kock and Mr. Kratzenberg, which was covered
13 both on direct and cross of both of these witnesses as
14 to what the clarification meant; or it could possibly
15 mean the conversation that Mr. Kock and Mr. Kratzenberg
16 had by telephone in early December of 1972, which was
17 covered by me on the direct of Mr. Kock and on cross of
18 Mr. Kratzenberg.

19 What exactly they mean by the word "clarification"
20 I don't know, sir. But I think it would fit within the ambit
21 of these two conversations.

22 MR. NEWMAN: I understand the question to be
23 talking about a conversation which was held subsequent
24 to November 27th, and there was testimony both by Mr. Koch
25 and by Mr. Kratzenbrey, both on each of their direct and

1 rdh32

2 each of their cross, with respect to the December conver-
3 sation. That's what I understand the testimony to be
4 referring to.

5 THE COURT: I would understand it to lead to the
6 kind of speculation in which you both understandably engaged
7 because it is the kind of inquiry respecting a relatively
8 ultimate question that I don't think you can give an
9 intelligible response to. I think the fair thing to tell
10 the jury is that, and to them that's the kind of question
11 they have to answer by drawing inferences from the testimony
12 they have heard.

13 If they say they want testimony about a particular
14 conversation on a particular date, we will give it to them
15 but we can't characterize any of this testimony as being
16 clarification. In a more ultimate sense they might send us
17 a note and say, give us the testimony that shows what the
18 agreement was. You understand? And each of you would
19 point to different conversations.

20 My feeling, subject to your wisdom, is we ought
21 not to speculate about such things and we ought to send
22 the jury back either to put together what they remember
23 the testimony is, or to send us a more concrete question.
24 That would be my answer.

25 Now, do either of you resist that answer?

1 rdh33

2 MR. NEWMAN: I do not, your Honor.

3 MR. BRASHICH: I do not, your Honor, not on
4 behalf of the plaintiff.

5 THE COURT: Let's do that because otherwise
6 we are just at sea.

7 As long as we are going to get them in, I also
8 suggest that we notify the jury we are going to sit until
9 6 P.M. tonight and then suspend for the day. And then we
10 are going to solicit their views as well as jurors, but
11 the alternatives are to come back tomorrow or come back
12 Tuesday. What are your preferences?

13 MR. BRASHICH: I believe I speak for the plaintiff--
14 that's a tough question.

15 MR. NEWMAN: I think even though it is more in-
16 convenient for everyone, including me, this should be in
17 a connected piece instead of having a weekend hiatus, unless
18 there is a strain on the jury, which should be paramount,
19 I would have no objection to continuing tomorrow.

20 THE COURT: How about if I solicit their preference
21 by a show of hands?

22 MR. NEWMAN: I think the feelings of the jury
23 should be paramount.

24 THE COURT: This is a civil case instead of a
25 criminal case. Even in a criminal case I try not to keep

1 rdh34

2 the jury in the dark. I take it none of you have any
3 objection to my telling them now rather than at 6.

4 MR. BRASHICH: No objection on the part of the
5 plaintiff, your Honor. I don't think that your Honor's
6 charge of telling them that 6 o'clock would be a cutoff time
7 should act as an Allen charge since they do have the op-
8 portunity to proceed on Saturday morning or on Tuesday.

9 MR. NEWMAN: I have no objection, your Honor.

10 THE COURT: Thank you both. Let's have them in.

11 (Jury present.)

12 THE COURT: Now, ladies and gentlemen, we have your
13 note and the delay in responding is because we have spent
14 a little time discussing it for reasons that I think will
15 appear now.

16 Your note asked for clarification. Now, what
17 is your clarification is a kind of ultimate question, and
18 one side might say, well, the clarification is what A said
19 to B. The other side may say no, that's not a clarification.
20 The clarification is what X said to Y. Actually without
21 the A and B's and C's and Y's that has been the nature
22 of some of the conversation between the lawyers and me
23 prompted by your note. So we can't give you what you want.
24 It is for you to review the evidence and decide what there
25 was a clarification; and if so, what its nature was and

1 rdh35

2 what it led to.

3 Let me try to make that clearer to you. First,
4 obviously, in any way that we can assist your your de-
5 liberations, all of us wish to do that. So I am not
6 normally delighted to tell you we can't give you the kind
7 of response you need. But if you were, for example, to send
8 out a note which said tell us which testimony shows the
9 nature of the agreement, you know that we couldn't do that
10 for you because that's what the case is about. Well, in
11 a sense, though, it is not quite as ultimate as that, your
12 question has that nature. You are asking what is the
13 clarification and the only way to do that is to argue one
14 side or other of the case. We have to leave that to you.

15 As long as you are out here, let me mention
16 to you the schedule of your work, our work and ask you a
17 question. We are going to continue with your deliberations
18 until 6 o'clock today, assuming you need that long, and
19 then assuming you need longer -- all this is a matter
20 within your control -- we are going to have to resume, of
21 course, and the choice is to resume tomorrow morning or
22 to resume Tuesday morning, which results, because Monday
23 is a legal holiday on this long weekend. Obviously it is
24 not desirable to break your deliberations by a long
25 weekend and it may well be that some of us who have other

1 rdh36

2 places we would like to be on a Saturday would not find it
3 overwhelmingly desirable to be here tomorrow.

4 Counsel and I have agreed that in the circumstances,
5 since we earn our livings at this work, we ought to leave
6 the preference to you, and on that I think we would have
7 to accept a majority vote rather than a unanimous verdict.
8 I am going to ask you your preference. I told you if we
9 are going to continue after this evening it would be
10 either tomorrow morning or Tuesday morning. I would like your
11 vote, first show me by raising your hands how many would
12 prefer tomorrow.

13 (None)

14 JUROR NO. 6: Either. Tomorrow is fine.

15 THE COURT: How many would prefer Tuesday?

16 JUROR NO. 3: Excuse me. Must we leave by 6 tonight?

17 THE COURT: Yes. Then we will decide it for you.

18 I don't think there is enough of wave of opinion on the jury
19 to make it appropriate to let you decide that. So having
20 offered you the opportunity counsel and I will make that
21 decision together and we will report it to you.

22 Now, although --

23 JUROR NO. 2: Excuse me, the action of Saturday
24 and Tuesday would be that we leave-- we discontinue now.

25 THE COURT: No. You are going to work to 6 in either

1 rdh37

2 event.

3 JUROR NO. 2: Then Saturday or Tuesday?

4 THE COURT: Then if you have no verdict, which
5 may well be the case, we will resume. Do you follow?

6 JUROR NO. 2: Yes.

7 MR. BRASHICH: May counsel and I approach side
8 bar?

9 THE COURT: Yes.

10 (At the side bar)

11 MR. BRASHICH: I believe your Honor might
12 suggest that you would tell them if they wanted to hear
13 a specific conversation, specific testimony that you would
14 give them this.

15 THE COURT: I thought I said that. Did I not?

16 MR. BRASHICH: No, sir.

17 MR. NEWMAN: I thought you said it but to satisfy
18 Mr. Brashich.

19 (In open court.)

20 THE COURT: Let me add one thing before you retire
21 because I may not have made it clear: If you sent us a
22 note that says we want to hear the conversation of such
23 and such a date between so and so and so and so, we
24 are going to find that and give it to you. But if you say
25 we want the conversation that tells how to decide the case,

1 rdh38

2 then we can't find that for you. In the same way we can't
3 find a conversation which you characterize as showing
4 the clarification. Does that clarify the answer to your
5 question?

6 Mrs. Merion?

7 JUROR NO. 6: Our forelady was going to ask it
8 but what we are trying to find specifically if there is
9 testimony that shows whether or not an attempt was made
10 to clarify --

11 THE COURT: I don't think we ought to pursue it.
12 That's for you to try to remember.

13 JUROR NO. 6: We can't.

14 THE COURT: Then you can ask for specific
15 conversations. If you want the conversation of such and
16 such a date or some other date, tell us about that and
17 we will give it to you. If you want all conversations
18 after November 27th between A and B, we will give you that.
19 But we can't pick out the things that we might feel are
20 one-sided or the other might feel are responsive to the
21 question as you have put it.

22 We don't want to get enmeshed in your deliberations
23 because that tends to violate the rules, so I guess I must
24 ask you at this point to return to the jury room and then
25 as soon as you formulated, if you must formulate a question

1 rdh39

2 of the kind I indicated we could answer, send us a note
3 and we will undertake to answer it and that will take a little
4 time, too. You understand, the reporter to find any particular
5 item of evidence, has to go winding through these tapes,
6 after we have agreed about what we are looking for, so you
7 will bear with us if and when that becomes necessary.

8 All right, if you will retire, please.

9 (Jury continues deliberations at 4:15 P.M.)

10 (Court Exhibit 2 marked.)

11 THE COURT: I am reluctantly led to agree with
12 Mr. Newman, perhaps both of you because I don't know
13 how the conversation went, that if we must come back
14 another day that we are pretty much obliged to come back
15 tomorrow rather than let the weekend intervene.

16 You are nodding your head.

17 MR. BRASHICH: Yes.

18 THE COURT: That's what we will tell them unless
19 something happens to make it moot.

20 All right, thank you, gentlemen.

21 (Jury note at 4:45 P.M.)

22 (In open court, jury not present.)

23 THE COURT: Is there any evidence in the record
24 that would give an answer to Court Exhibit No. 3? Have
25 you checked the testimony on this subject?

1 rdh40

2 MR. BRASHICH: The only testimony I recall on
3 my direct, your Honor, whereby I asked Mr. Kock what he
4 was earning prior to going into business with Mr. Tiede
5 at Blair Television, his response was \$22,000. There is some
6 other testimony elicited but it was in the deposition.

7 THE COURT: I am talking about evidence in the
8 record?

9 MR. BRASHICH: No, your Honor.

10 THE COURT: You asked what he was earning and the
11 answer was \$22,000?

12 MR. BRASHICH: Yes.

13 THE COURT: May I tell that to the jury?

14 MR. NEWMAN: We think it may be the testimony,
15 maybe it included bonuses and--

16 (Record read)

17 THE COURT: Suppose you read just that question
18 and answer when the jury comes out.

19 (Jury present.)

20 THE COURT: At this time I think we can help you,
21 ladies and gentlemen. We will have the question and
22 answer from Mr. Kock's direct testimony that we have
23 agreed is responsive to your question. I will ask the
24 reporter to read it.

25 (Record read)

1 rdh41

2 THE COURT: That refers to the time you asked.

3 Okay, why don't you retire again.

4 (Jury continues deliberations at 4:50 P.M.)

5 (Court Exhibit 3 marked.)

6 (Jury verdict at 5:30 P.M.)

7 (In open court, jury not present.)

8 THE COURT: This note indicates that the jury
9 has a verdict, and in spite of my instructions the jury
10 has repeatedly in both civil and criminal cases put a
11 verdict in the note, so I will share it with you. It says
12 we find for the plaintiff damages to be paid by Brunswick
13 in the amount of \$79,464.78.

14 Let's have the jury in to confirm that that is
15 their verdict.

16 will you want the jury polled?

17 MR. NEWMAN: Yes, I would like the jury polled,
18 your Honor.

19 (Jury present)

20 THE COURT: Madam forelady, your note indicates
21 you have reached a verdict for the plaintiff in the amount
22 of \$79,464.78. Is that the verdict of the jury?

23 THE FORELADY: Right.

24 THE COURT: It has been requested that the jury
25 be polled, so I will ask the clerk, Mr. Swansiger, to

ONLY COPY AVAILABLE

1 rdh42

2 poll the jury.

3 THE CLERK: Members of the jury, listen to your
4 verdict as it stands recorded. You say you find in favor
5 of the plaintiff in the amount of \$79,464.78. Is that your
6 verdict?

7 (The jury answered the question in the affirmative.)

8 THE COURT: All right, ladies and gentlemen,
9 it is late and you have been here a long and busy day.
10 I won't keep you but I will, if I may, thank you for your
11 service in this case. I understand your jury service is
12 concluded and we in the court and your fellow citizens
13 are in your debt for your participation in the administration
14 of justice. You have been a thoughtful and attentive
15 jury and you pay us to try to be thoughtful and we are
16 grateful to you for that, too.

17 So let me excuse you at this point with the
18 gratitude which I have expressed and good wishes.

19 Good afternoon, ladies and gentlemen.

20 MR. BRASHICH: Thank you very much. Good afternoon.

21 (Court's Exhibit 4 marked.)

22 (Jury excused)

23 THE COURT: Anything further at this time? Mr.
24 Newman?

25 MR. NEWMAN: Your Honor please, I move to set aside

2 the verdict on the grounds that the damages are excessive.
3 I move to set aside the verdict on the ground it is against
4 the weight of the evidence.

5 THE COURT: The motions are denied and the court
6 will direct that judgment be entered on the verdict.

7 All right, gentlemen, thank you.

8 MR. BRASHICH: Good afternoon, your Honor. Thank you.

9 -----
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

454 A

EXHIBIT 14

**Contract dated November 17, 1972 between
Kock and N. W. Ayer, Inc.**

Belt & F & T

N.W.AYER & SON, INC.

KS 1/28/74 WEST WASHINGTON SQUARE, PHILADELPHIA, PA 19106
XXXXXXXXXXXXXXXXXXXXXX

080817

ORDER NO. & DATE: 281001-291 11/17/72

CLIENT: U. S. ARMY RECRUITING COMMAND
001

Bowling Score Sheet Advertising
c/o Winston Kock Assoc.
220 E. 73rd Street
New York, N.Y. 10021

ATTN: Winston Kock

PRICE \$ 15,000.00 NET

Production: D. Belshaw - 215-829-4275

Media Buyer:

HARRIET H. Harrison 5TH floor #

ADV. NO.	ADVERTISEMENT CAPTION	ON SALE DATE	INSERTION DATE	SPACE UNIT
81-001-73-PP-3206	SCORE "BOWLING SHEETS"		1973 Jan. 1 for 6 months X	2-3/4 high 5-3/4 long 1 time To Jack Lynch

NOTE: No coupon ad is to be backed up by a page in which another coupon ad appears.
POSITION: Newspapers and Magazines: We request that no competitive advertising appear on the same or facing page.

As per agreement with Mr. Kock.

Clarified with Dave by Tel Con 10/4 11AM that printing takes place in four Districts
beginning March 73 and that bottom of score sheet has 2 coupons but
second coupon will not be competitive.

NOTE: Two full issues to reach "Reproduction Review Board", 8th Floor, Ayer/Philadelphia,
3 to 5 days in advance of your sale date.

NOTE: Your compliance with the Equal Opportunity Clause of Section 202 of Executive Order 11246 of Sept. 24, 1965, and subsequent implementing regulations, is an expressed condition of this order. Acceptance or fulfillment thereof shall constitute acceptance by you of the terms of the Equal Opportunity Clause. As interpreted by Ayer, the clause is not applicable if purchases placed with you for an indicated advertiser do not aggregate more than \$10,000 annually.

ADVERTISING COVERED BY THIS ORDER SHALL BE SUBJECT TO MAXIMUM PRICE LEVELS DETERMINED PURSUANT TO REGULATIONS PUBLISHED UNDER EXECUTIVE ORDERS 11615 DATED AUG. 1, 1971 AND 11627 DATED OCT. 15, 1971.
and additional checking copies to:

COPY TO: Lt/Col. Childress, Advtg. & Info., U.S. Army Recr. Command, Hampton, Va. 23369

COPY TO: Commanding General, U.S. Army Adv. Command, ATTN: Command Goup, Hampton, Va. 23369

COPIES TO: Commanding General, U.S. Army Adv. Command, ATTN: USARCAI-D, Hampton, Va. 23369

MEMBER OF

455 A

(Member of A.A.A.C.I.)

CONTRACT CONDITIONS & BILLING
INSTRUCTIONS (SEE REVERSE SIDE)

NEWSPAPERS: SEND BILLS TO: N. W. AYER & SON, INC.
West Washington Square
Philadelphia, Pa. 19106

Send full issue to nearest

Advertising Checking Bureau Office:

ACB - G.P.O. Box 1322 • New York, N.Y. 10001

ACB - P.O. Box 134 • Columbus, Ohio 43212

ACB - P.O. Box 6326 • Chicago, Ill. 60688

ACB - P.O. Box 1067 • Memphis, Tenn. 38101

ACB - P.O. Box 3419 • Rincon Annex,
San Francisco Calif. 49119

MAGAZINES & OTHER PUBLICATIONS - Not using A.C.B.

Send bills with two tear sheets attached

and one full issue to:

Checking Department:

N. W. AYER & SON, Inc.
West Washington Square
Philadelphia, Pa. 19106

PUBLICATION ORDER TERMS

BILLING INSTRUCTIONS

- a. Individual, itemized invoices for each client to be rendered monthly to N. W. Ayer & Son, Inc., Philadelphia, Penna. (Newspaper invoices to show exact line(s) inserted.)
- b. Separate monthly invoices to be submitted for any commission, rate, mats or other "preparation/production type" charge rendered.
- c. Credits to be rendered separately.
- d. All invoices/credits to show our order number and date, and a brief explanation to identify nature of charge or credit.
- e. All invoices/credits to be rendered in duplicate.
- f. Any short rate charges affecting this advertisement will be honored within 30 days after close of contract period or they will not be honored.

CONDITIONS OF SALE

- a. In accepting this order, publisher warrants that he has and follows a uniform policy in dealing with all agencies and advertisers.
- b. The agency assumes all liability for libel, slander, illegal competition or trade practices, infringement of trade marks, trade names, copy rights, the violation of rights of privacy with respect to advertising furnished by agency and printed by publisher for publication as herein ordered.
- c. The publisher shall not be liable for any damage resulting from editorial content and other material furnished by the publisher and printed in publications as herein ordered.
- d. Such indemnification outlined in b. and c. above shall survive the termination or cancellation of this contract.
- e. This order is to be combined with all other orders placed by the herein mentioned client company and its divisions and subsidiaries (and/or their agencies) or if a division or subsidiary with orders placed by the parent company and its divisions or subsidiaries (and/or their agencies) in order that all may earn the low of rate applicable to the combined schedules.
- f. This order may be revised or cancelled at any time unless otherwise stipulated on the rate card. In such cases, agency and publisher agrees to abide by conditions of cancellation as printed on the rate card.

RATES

- a. Publisher represents that all his rates are published and that no such rates to advertiser or agency upon request.
- b. Charges for space herein ordered are in accordance with the publisher's rate card upon which this contract is based.
- c. If at any time during the term of this contract publisher offers a reduction in his rates, the advertiser and agency are to have the immediate benefit of such reductions with the effective date of such reductions.
- d. In accepting this order, publisher warrants that the rates set forth are as low as any now being given to any other advertiser of like return, for comparable space whether such space was placed direct or through an advertising agency or through any source and irrespective of the location of the advertiser, agency or other source.

Upon granting of lower rates to any other advertiser, publisher agrees that such lower rates will become immediately available to advertiser/agency herein named.

- e. If additional space is used during the contract period by this advertiser, his parent company and/or his divisions and subsidiary companies and a lower rate is earned, publisher agrees to grant said lower earned rates to all advertising run during the contract period.

ADVERTISING MATERIAL

- a. Subject matter, form, wording, illustration and typography of the advertising is subject to approval by the publisher, but he consents to agency placing in advertising material without consent of the agency.
- b. The agency, if necessary, shall publish a notice to run the advertising and shall furnish publisher and agency immediately.
- c. If the agency's material, furnished by the publisher does not agree with the agency's desire, publisher is advised to sign, edit number, caption, etc., publisher is to submit copy immediately and ask for changes. If agency cannot be reached, advertising is to be omitted.
- d. Under no circumstances shall any space have to be denied.
- e. Under no circumstances shall any space be granted.

It is understood that the agency will furnish to publisher a copy of the copy to be run, and publisher will furnish to agency a copy of the copy to be run.

- f. All copy sent to publisher must be typed in double spaced, one and one-half inch margins, 10 point type, and in black ink.

CANCELLATION OR ADVERTISING

- a. Advertising space placed in all editions of publication or editions not heretofore listed, if publisher fails to insert or advertise in any section herein and the agency fails to notify publisher in writing.
- b. Cancellation shall be made in writing to the agency from publisher.
- c. When cancellation is made, if copy for advertising sent to publisher, it is to be returned to agency, and publisher will make a full adjustment for unused editions.
- d. Space created thereby by publisher or agency will be counted toward the minimum order rate by publisher.

It is understood that cancellation of copy by agency or publisher, or both, will be made in writing to the agency from publisher, and publisher will make a full adjustment for unused editions.

PAYMENT

- a. All payments will be made on the basis of our order, with a paper copy of space will be collected without detail description.
- b. We will only pay for publication advertising ordered by N. W. Ayer & Son, Inc.

457 A

EXHIBIT 15

**Proposed Contract prepared by Kock
dated October 12, 1972 and letter
dated November 27, 1972 from Brunswick
to Kock.**

WINSTON E. KOCK JR.

220 East 73rd Street

458 A

New York City, N.Y. 10021

(212) 988-1478

October 12, 1972

AGREEMENT BETWEEN:

WINSTON E. KOCK JR. and BRUNSWICK CORPORATION
(Revises June 8, 1972 Agreement)

This will confirm and expand our several conversations, meetings, correspondence, and Agreement of June 8, 1972 regarding my furnishing you with certain bowling score sheets for the approximately 200 bowling centers owned and operated by you. (see attachments)

I will supply you with 4.5 million open color bowling score sheets, and will increase the number of plastic sheets for league bowling from 30,000 originally agreed upon to 60,000. This supply will be for a period commencing March 1973 thru March 1974 and will be deemed automatically extended for an additional year or years unless terminated by either party.

It is understood that both you and I will have the right to terminate the same by giving notice ninety (90) days prior to the expiration of our agreement or any renewal.

It is further agreed that I may make delivery of the four million five hundred thousand (4,500,000) color open score sheets and the sixty thousand (60,000) league plastic sheets, at my option, on an annual basis, a semi-annual basis, or a quarterly basis, said delivery time being proportionate to the respective time period covered.

continued . . .

I further re-iterate that it is imperative that these score sheets receive full and fair exposure, and that you therefore will use the same in bowling centers owned and operated by you exclusively for the period of this agreement.

You have brought to my attention that you desire that advertising carried on such score sheets will not carry any advertising for fast food services, nor exhibit any competitive bowling equipment, and I agree to be bound by your restrictions.

I also confirm that I will consult you for your approval with regard to any merchandising assistance that I may seek, and that your approval must be obtained. (Examples: we talked about a candy advertiser must be a name brand to be carried in the machine, likewise a cigarette would be carried, a cigar carried where cigars are sold, etc.)

It is also understood that you will provide me with accurate shipping instructions and quantities for each and every bowling center owned and operated by you at your earliest convenience so that delivery may be effected for March 1973.

It is understood that I shall provide and pay for shipping charges incurred in the distribution of these bowling sheets by me, and I further agree to place at your disposal in your district office centers a supply of additional sheets for use not anticipated by this contract and quantities specified by you for your centers.

Additional points raised in our conversations and writings since our initial agreement are hereby added to that agreement and clarified as follows:

A. That you have a single supplier of soft drinks. That supplier is Coca-Cola, and I agree not to carry any advertisements for any other soft drink soda company. (Example: No Pepsi-Cola, No Royal Crown, etc.)

continued . . .

B. That "Welcome to Brunswick" or a slug line similar, shall be printed directly under the Winston Kock Associates on the score sheets.

C. That quantities for each bowling center shall be quoted by you on the basis of annual use, semi-annual use, and quarterly use.

That since league telescore sheets are of two sizes, you shall indicate which centers get which sizes along with the quantities needed.

That I will supply league paper sheets to those centers where telescores are not in use, and that you will likewise indicate which centers these are and what quantities of league paper sheets they require.

That each individual center shall mail to me at least one sample of the score sheet they were using, so that I may show advertisers what my new color sheet has replaced.

D. That additional advertising/marketing testing similar to the original market test may be conducted by myself at my expense in any of the bowling centers. Such testing is subject to your approval with details to be agreed upon before such testing is done.

E. It is specifically understood that any and all advertiser shall be subject to your prior written approval. Immediately upon your acceptance of this agreement a list thereof shall be made available to you for your said approval.

Yours sincerely,

Winston E. Kock Jr.

WEK:drb

Agreed to and accepted: BRUNSWICK CORPORATION

By _____

*Reft ac A R.T.J.
K's - 1/28/74*

461A

Bowling Division **Brunswick**

BOWLING
CENTER
OPERATIONS



November 27, 1972

Mr. Winston E. Kock, Jr.
220 E. 73rd Street
New York, N.Y. 10021

Dear Mr. Kock:

Subject: Score Sheet Agreement

This is to confirm our intention to enter into an agreement with you for you to supply, exclusively, score sheets and plastic sheets upon a basis substantially as set forth in the attached proposed letter agreement dated October 12, 1972.

As we explained to you, Brunswick may have certain commitments to Walt Peabody Advertising Service. Brunswick intends to live up to any legally binding obligation to Peabody, but we will take every legally permissible step to phase them out at the earliest practicable time.

You have agreed to hold open the proposal outlined in that letter of October 12 until Brunswick can clarify its legal position with Peabody.

Very truly yours

BRUNSWICK CORPORATION

By William Kratzenberg
William Kratzenberg
National Merchandise Manager

WMK/a

462 A

EXHIBIT 78

**Letter dated December 1, 1972 from
Rumrill Hoyt, Inc. to Kock.**

ADVERTISING/PUBLIC RELATIONS 380 MADISON AVENUE, NEW YORK, NEW YORK 10017 TEL. MU 2-2000

Reft by G. f. J.
KS 1/28/74

463 A

Rumrill-Hoyt, Inc.

December 1, 1972

Mr. Winston Kock
220 East 73rd Street
New York, New York

Dear Winston:

This is to confirm our intention on behalf of our Client, Pharmacraft, to implement a March through September 1973 schedule on your bowling program.

We are presently preparing artwork for you and anticipate its delivery to the New Jersey address that you specified by the first week in January.

If you have any contractual materials for us to sign or fulfill, please forward them to my attention here at Rumrill-Hoyt.

Sincerely,

Pl

Phillip G. Jackson

PGJ/1d

464 A

EXHIBIT 80

**Letter dated January 4, 1973 from
Baskin-Robbins to Kock.**



Reft by H & J
465A 1S 1/20/74
BASKIN-ROBBINS ICE CREAM

1201 SOUTH VICTORY BOULEVARD • BURBANK • CALIFORNIA • 91502 • (213) 843-1060

January 4, 1973

Mr. Winston E. Kock, Jr.
220 East 73rd Street
New York, New York 10021

Dear Mr. Kock:

This will confirm our agreement to purchase the Bowling Score Sheets ad for the period of March, 1973 to September, 1973, for 200 Brunswick Bowling Centers.

I am sending to you art work to size and ask that you send the billing to my attention.

Should all work well, we would be interested in covering more centers in the future, since Baskin-Robbins has more than 1,200 locations coast to coast.

Sincerely yours,

A handwritten signature in cursive script that appears to read "Barbara Brooks".

Barbara Brooks, Manager
Advertising/Sales Promotion

BB:raj

466 A

EXHIBIT 81

**Letter dated January 9, 1973 from
Chelsea Milling Co. to Kock.**

TELEPHONE
313-475-3341

Draft by N. Holmes
467A 1/28/73

MANUFACTURERS OF
"JIFFY" MIXES

CHELSEA MILLING COMPANY
CHELSEA, MICHIGAN 48118

January 9, 1973

Mr. Winston Kock, Jr.
220 E. 73rd
New York, New York 10021

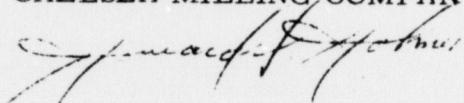
Dear Mr. Kock:

After much analysis and thought this will indicate to you our commitment for your bowling score sheet program in the 200 Brunswick centers starting this March.

As you know, "JIFFY" is nationally distributed and depending upon the successful consumer reaction to this program I will let you know as regards additional centers this coming Fall.

Enclosed is the art work from which you will make the lay out for the top center position.

Sincerely yours
CHELSEA MILLING COMPANY



Howard S. Holmes

HSH/jr

468 A

EXHIBIT 84

**Letter dated February 7, 1973 from
Carter Wallace to Kock.**

Dept A, P. H. H.
469A
CARTER PRODUCTS

DIVISION OF CARTER WALLACE, INC.

767 FIFTH AVENUE • NEW YORK, N.Y. 10022 • (212) 758-4800

CABLE ADDRESS
ADRICAP N.Y.

February 7, 1973

Mr. Winston E. Kock, Jr.
Winston E. Kock Associates
220 East 73rd Street
New York, New York 10021

Dear Win:

This is to confirm that we will be participating
in the "Bowling Scoresheet" Program for ACTIVE
for the March-September period.

The scoresheet proof is being routed for perusal/
comment, and I'll be speaking with you on this
before the end of the week.

Thank you.

Cordially,

Ray Neuman
Raymond D. Neuman
Product Manager
Carter P.D., Inc.

RDH/df

470 A

EXHIBIT 93

**Letter dated May 16, 1973 from
Baskin-Robbins to Kock**



471A

Reft a J f T.J.
125 1/28/74

BASKIN-ROBBINS ICE CREAM

1201 SOUTH VICTORY BOULEVARD • BURBANK • CALIFORNIA • 91502 • (213) 843-1060

May 16, 1973

Mr. Winston E. Kock, Jr.
220 East 73rd
New York, New York 10021

Dear Mr. Kock:

We have learned that your Bowling Score Sheets are not being used in all of the Bowling Centers you indicated to us.

Based on this information, we will not honor our bill with you until we can receive clarification.

Sincerely,

A handwritten signature in cursive script that appears to read "Barbara Brooks".

Barbara Brooks, Manager
Advertising/Sales Promotion

BB/raj



ONE COPY

Service of one copies of the
within Appendix is hereby
admitted this 27th day of
Jan. 1975

Signed Cynthia Barone for Brashler & Finley
Attorney for Plaintiff - Appellee